IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-5[illegible]

MICHAEL J. CASSIUS, Petitioner,

v.

STATE OF ARIZONA, Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT

OF THE STATE OF ARIZONA

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792-8145

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MICHAEL J. CASSIUS, Petitioner,

v.

STATE OF ARIZONA, Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT

OF THE STATE OF ARIZONA

The petitioner MICHAEL J. CASSIUS, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Arizona entered in this case on April 16, 1974, and made final by the order of the Supreme Court of the State of Arizona denying petitioner's motion for rehearing entered on May 21, 1974.

Opinions Below

The opinion of the Supreme Court of the State of Arizona, filed April 16, 1974 is reported at 110 Ariz. 485, 520 P.2d 1109 (1974); and the opinion of the Court of Appeals of the State of Arizona, Division Two, filed November 8, 1973, is reported at 21 Ariz. App. 78, 515 P.2d 903 (1973).

Jurisdiction

The judgment of the Supreme Court of the State of Arizona was entered on April 16, 1974. A timely motion for rehearing was denied on May 21, 1974, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is

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involved under 28 U.S.C.A. 1257 (3).

Questions Presented

1. Did not petitioner's conviction of "committing a felony while on bail on felony charge," Ariz. Rev. Stat. Ann. § 13-1580 (Supp. 1973), violate petitioner's rights under the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment to the Constitution?

2. Did not petitioner's conviction of "committing a felony while on bail on felony charge," Ariz. Rev. Stat. Ann. § 13-1580 (Supp. 1973), violate petitioner's rights under the Equal Protection Clause of the Fourteenth Amendment to the Constitution?

Constitutional and Statutory Provisions Involved

The principal United States Constitutional provisions involved are the Double Jeopardy Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Article 2, Section 22 of the Arizona Constitution, and Section 13-1580 of the Arizona Revised Statutes Annotated are set forth below:

Ariz. Const. art. 2, § 22:

> "All persons charged with crime shall be bailable by sufficient sureties, except for:
> 1. Capital offenses when the proof is evident or the presumption great.
> 2. Felony offenses, committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge."

Ariz. Rev. Stat. Ann. § 13-1580:

> "A person who is convicted of committing any felony offense, whether federal or state, which felony offense is committed while such person is released on bail or his own recognizance on a separate felony charge, is guilty of the offense of committing a felony while released on bail or his own recognizance and upon conviction of such crime shall be punished by imprisonment in the state prison for not more than five years. Such

> penalty shall be in addition to and shall be served consecutively to any penalty imposed for the offense committed while released on bail or on his own recognizance."

Statement of the Case

On October 17, 1972, petitioner, then 21 years old, was arrested and charged with burglary of a motor vehicle. The following day, he was released on his own recognizance. Case No. A-22479 was subsequently assigned to this matter.

On November 4, 1972, while released on his own recognizance on the first charge, petitioner was arrested at the scene of an apparent store burglary. Petitioner was charged, Case No. A-22303, with two counts: Count I, first degree burglary (Ariz. Rev. Stat. Ann. § 13-302 (Supp. 1973)), and Count II, "committing a felony while on bail on felony charge" (Ariz. Rev. Stat. Ann. § 13-1580 (Supp. 1973)).

Proceedings were held on January 4, 1973, at which time the charge in Case No. A-22479 was dismissed on the prosecutor's motion and petitioner pleaded guilty to Count I of Case No. A-22303. Count II of Case No. A-22303 was submitted to the court on stipulated facts, and petitioner was found guilty.

On January 22, 1973, petitioner was sentenced to imprisonment under Count I for not less than one nor more than two years, and to a consecutive term under Count II of not less than one nor more than three years.

On appeal, petitioner argued in his briefs that this conviction under Count II violated the Constitutional protection against Double Jeopardy. The Arizona Court of Appeals, on November 8, 1973, reversed petitioner's conviction under Count II (Ariz. Rev. Stat. Ann. § 13-1580), holding section 13-1580 violative of the Equal Protection Clause of the Fourteenth Amendment, and refusing to consider petitioner's claim that the

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statute also subjected him to double jeopardy in violation of the Fifth and Fourteenth Amendments. State v. Cassius, 21 Ariz. App. 78, 515 P.2d 903 (1973).

The Arizona Supreme Court granted a Petition for Review by the State and petitioner, thereafter, obtained permission to file a memorandum of additional argument in which he argued both the claim of double jeopardy and that of denial of equal protection. On April 16, 1974, the Arizona Supreme Court vacated the Court of Appeals' decision and affirmed petitioner's conviction. The Arizona Supreme Court expressly rejected petitioner's claims of double jeopardy and of denial of equal protection. State v. Cassius, 110 Ariz. 485, 520 P.2d 1109 (1974). On May 21, 1974, that Court denied petitioner's Motion for Rehearing.

Requests for certification and transmission of the record in this case have been filed in both the Arizona Supreme Court and the Superior Court of the State of Arizona, in and for the County of Pima.

Argument I

PETITIONER'S CONVICTION OF ARIZ. REV. STAT. ANN. § 13-1580 SUBJECTED HIM TO DOUBLE JEOPARDY.

Ariz. Rev. Stat. Ann. § 13-1580 makes any "person who is convicted of committing any felony offense" also "guilty" of the felony offense set forth therein, provided only that the first offense "is committed while such person is released on bail or his own recognizance on a separate felony charge." That is, a person who is convicted of one felony offense is thereby guilty of two felony offenses. Could there be a more classic definition of multiple jeopardy for the same offense? See, North Carolina v. Pearce, 395 U.S. 711, 717 (1969); Ex parte Nielsen, 131 U.S. 176 (1889). As the Arizona Court of Appeals stated, for a "single act,

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[petitioner] has been convicted and sentenced for two felony offenses." 21 Ariz. App. at 82, 515 P.2d at 907.

It is important to note that section 13-1580 creates a separate offense and does not merely provide for an augmentation of punishment. Thus a conviction under section 13-1580 is relevant in determining whether and to what extent a recidivist penalty provision, such as Ariz. Rev. Stat. Ann. §§ 13-1649 & 13-1650, should apply, and how time credits for good behavior, such as Ariz. Rev. Stat Ann. § 31-251(B), will be computed. It is not clear whether or under what circumstances a reversal of the conviction for the primary offense would mandate a reversal of the conviction for section 13-1580. Unlike a penalty augmentation provision, where some discretion whether to apply the provision rests with the trial court (see, State v. Jacobson, 110 Ariz. 70, 515 P.2d 27 (1973)), the sole discretion whether to impose the penalty of section 13-1580 rests with the prosecutor. Because section 13-1580 does create a separate offense, a prosecutor, at his whim or design, may charge a defendant with a violation of section 13-1580 after a defendant has been sentenced under the primary conviction or even after a defendant has completed serving his sentence.

It also should be noted that the Constitution demands that one charged with the crime be presumed innocent until proven guilty. In re Winship, 397 U.S. 358 (1970). Yet section 13-1580 clearly presumes that one merely charged with a crime is more culpable when he thereafter commits a crime than a person not previously charged who committed the same crime.

It makes no difference whether the standard used for determining if there is double jeopardy for the same offense is the "same elements test", Blockburger v. United States, 284 U.S. 299 (1932), or the "same transaction test", see Ashe v. Swenson, 397

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U.S. 436, 448-460 (1970) (Brennan, J., joined by Douglas & Marshall, J.J., concurring). The constituent elements of a crime are the same as their sum total, conviction of the crime. Section 13-1580 would have the same meaning if instead of reading "[a] person who is convicted of committing any felony offense", it read "[a] person who is convicted of committing robbery, or burglary, or grand theft, or arson, or any other felony offense."

Indeed, the only possible difference between the primary offense which supplies the necessary conviction and the "offense" described by section 13-1580 is the factor of commission while released on a pending felony charge. Under Arizona law, this factor is not an element of a crime. A crime "is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction," penal sanctions. Ariz. Rev. Stat. Ann. § 13-101 (1956). The corpus delicti, or elements, of a crime are (1) that a certain result has been produced, and (2) that some person is criminally responsible for the act. State v. Thomas, 78 Ariz. 52, 59, 275 P.2d 408, 413 (1954). Assuming competency, the elements of criminal responsibility are an actus reus (act or omission) and a mens rea (requisite mental state). See R. Anderson, Wharton's Criminal Law and Procedure §§ 60-70 (1957). The fact of being released on bond or recognizance is neither an act or omission on the defendant's part, nor a mental state, nor a consequence of the actus reus of A.R.S. § 13-1580. It is a status over which the courts have ultimate control, and the release may or may not conform to the defendant's will and volition. To illustrate, it must be conceded that if a court of competent jurisdiction orders a defendant released on his own recognizance, that defendant must be released even though he wishes to remain in jail (and there are such defendants).

Punishment for a status is prohibited by the Eighth

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Amendment's Cruel and Unusual Punishment Clause, Robinson v California, 370 U.S. 660 (1962), as well as, under circumstances such as those prescribed by section 13-1580 (i.e., application to and easily ascertainable group and punishment without the necessity of an additional trial) by the Bill of Attainder Clause of Article I, Section 10 of the Constitution. The State of Arizona can no more make it a separate crime to be convicted of a felony committed while released on bail or recognizance for another felony charge than it can make it a separate crime to be convicted of a felony committed while unemployed.

Because petitioner's conviction under Ariz. Rev. Stat. Ann. § 13-1580 violates the Double Jeopardy Clause of the Fifth Amendment, as applied to the States by the Fourteenth Amendment, that conviction should be reversed.

Argument II

PETITIONER'S CONVICTION OF ARIZ. REV. STAT. ANN. § 13-1580 DENIED HIM EQUAL PROTECTION OF THE LAWS.

Article 2, Section 22 of the Arizona Constitution establishes release upon furnishing sufficient sureties as a constitutional right. Regarding this right, the Arizona Court of Appeals in its opinion in this case stated:

> "Although bail is conditioned upon the giving of "sufficient sureties", Rendel v. Mummert, 106 Ariz. 233, 474 P.2d 824 (1970), it is nonetheless a constitutionally protected right. As stated in Stack v. Boyle, 342 U.S.1, 72 S.Ct. 1, 96 L.Ed. 3 (1951): This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. [Citations omitted] Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning. 21 Ariz. App. at 83, 515 P.2d at 908.

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Having granted such a right, a state cannot implement it in such a way as to create invidious discriminations. Griffin v. Illinois, 351 U.S. 12 (1956). Where a discrimination has the effect of chilling or impairing the exercise of a fundamental right, the discrimination may be characterized as invidious and will only be sustained under the Equal Protection Clause if it can be shown to be demonstrably necessary to promote a compelling state interest. E.G., Shapiro v. Thompson, 394 U.S. 618, 634 (1969); United States v. Jackson, 390 U.S. 570 (1968); Williams v. Rhodes, 393 U.S. 23 (1968); Sherbert v. Verner, 374 U.S. 398 (1963); Skinner v. Oklahoma, 316 U.S. 535 (1942); In re King, 3 Cal.3d 226, 474 P.2d 983, 90 Cal. Rptr. 15, (1970); Spillers v. State, 84 Nev. 23, 436 P.2d 18, (1968).

The effect of section 13-1580 is to create two classes of convicted felons -- one class of persons who commit felonies while in custody on pending untried charges or while released on pending misdemeanor charges or while not facing criminal charges, and another class of persons who commit felonies while released on pending untried felony charges. The sole difference between those awaiting trial on felony charges in the two classes is that those in the second class have exercised their constitutional right to release. On the basis of this distinction, the second class is found guilty of two felonies for every felonious act committed, while the first class is found guilty of only one. The Arizona Court of Appeals ably illustrated how this discrimination operates:

> "A and B are both arrested and charged with burglary. A is released on bail and B remains in jail. While released, A commits aggravated battery on a police officer. While in jail, B also commits aggravated battery on a police officer. Pursuant to a plea bargain, the original burglary charges against both A and B are dropped in exchange for a plea of guilty to the battery charges. Notwithstanding the fact that A and B have committed identical crimes, A may be convicted of two crimes--

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> (1) aggravated battery and (2) committing a felony while released on bail or own recognizance. However, A can only be convicted of aggravated battery because his crime was committed in jail. Taken one step further, assume that A had been mistakenly accused and was totally innocent of the burglary charge. Under A.R.S. § 13-1580 he may still be convicted of two criminal offenses for the single battery solely because the act was committed while on bail." 21 Ariz. App. at 84, 515 P.2d at 909.

It should be added that the decision whether and when to charge the additional offense of section 13-1580 is left solely to the prosecutor's discretion.

The Arizona Court of Appeals correctly stated:

> "A.R.S § 13-1580 not only prescribes different penalties for the same offense, but also creates an additional crime for the same offense, which crime can only be committed after one has exercised his constitutional right to bail.
>
> . . . Making it an offense to be convicted of a felony which was committed while on bail neither helps secure the attendance of a defendant at trial nor insures compliance with the legal processes of this State. It serves no other purpose than to make bail an instrument of oppression which our Supreme Court has denounced. [Gusick v. Boies, 72 Ariz. 309, 734 P.2d 430 (1951)]. Our legislature has effectively chilled the assertion of the constitutional right to bail by penalizing those who have chosen to exercise it.
>
> Regardless of the character of the crime, an accused on bail is clothed with the presumption of innocence. Gusick, supra. By singling out those admitted to bail, A.R.S. § 13-1580 strips the innocent of that presumption. One accused of a crime is not ipso facto a menace to society as A.R.S. § 13-1580 seems to presume. Such a presumption erodes the very foundation of our system of criminal justice, namely, the presumption of innocence." 21 Ariz. App. at 85, 515 P.2d at 910.

Section 13-1580, though chilling a right hallowed in Anglo-American jurisprudence and protected by the Arizona Constitution, is not demonstrably necessary to promote a compelling State

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interest. The duty of an individual to obey the law exists and draws its vitality independently of section 13-1580. Release from custody is conditioned upon good behavior, Ariz. Rev. Stat. Ann. § 13-1577 (D); such release can be revoked upon a breach of that condition, Rendel v. Numbers, 106 Ariz. 233, 474 P.2d 824 (1970), Ariz. Rev. Stat. Ann. § 13-1578; and subsequent release can be denied, Ariz. Const. art.2, § 22 (2). The fact that a crime was committed while the defendant was released on another pending charge is certainly a matter which the trial court can take into consideration in determining the severity of the penalty to be imposed. Cf. Williams v. New York, 337 U.S. 241, 246-49 (1949); State v. Killian, 91 Ariz. 140, 370 P.2d 287 (1962).

Further, section 13-1580 requires that the sentence therein provided be served consecutively to the sentence for the offense committed while on release. Such a requirement of consecutive service of sentences appears no where else in the Arizona statute. There can be no rational basis for allowing one who commits two separate burglaries to serve concurrent sentences on these offenses, while a person who commits only one burglary must serve two consecutive sentences merely because his burglary was committed while he was released on a pending charge of which he was presumed innocent. Such an unreasonable disparity in sentencing practices and severity also violates the Equal Protection Clause. See James v. Strange, 407 U.S. 128 (1972).

Because petitioner's conviction under Ariz. Rev. Stat. Ann. § 13-1580 violates the Equal Protection Clause of the Fourteenth Amendment, that conviction should be reversed.

Conclusion

For the foregoing reasons, a writ of certiorari should issue

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to review the judgment and opinion of the Supreme Court of the State of Arizona.

Respectfully submitted this 9th day of August, 1974.

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CLIFFORD H. WARD
CLERK

Supreme Court

STATE OF ARIZONA
Phoenix
85007

May 22, 1974

STATE OF ARIZONA,

Appellee,

v.

MICHAEL J. CASSIUS aka CARL JACKSON,

Appellant.

Supreme Court
No. 2867-PR

Pima County
No. A-22303

FILED
1974 MAY 23 AM 8:33
CLERK SUPREME COURT

The following action was taken by the Supreme Court of the State of Arizona on May 21, 1974 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing = Denied."

Copy of Order Affirming Judgment and Sentence enclosed herewith.

CLIFFORD H. WARD, Clerk
By Mary Ann Hopkins
Deputy Clerk

TO: John M. Neis, Pima County Public Defender, 45 West Pennington, Tucson, Arizona 85701 ATTN: Frederick S. Klein, Esq.
Hon. Gary K. Nelson, Attorney General, 159 Capitol Building, Phoenix, Arizona 85007 ATTN: Frank T. Galati, Esq.
Howard L. Fell, Assistant Attorney General, 415 West Congress, Tucson, Arizona 85701
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West Publishing Company, 50 West Kellogg Boulevard, St. Paul, Minnesota 55102
Michael J. Cassius aka Carl Jackson, Arizona State Prison, Box B, Florence, Arizona 85232

dkb

IN THE SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA, Appellee, v. MICHAEL J. CASSIUS aka CARL JACKSON, Appellant.	)	No. 2567-PR ORDER AFFIRMING JUDGMENT AND SENTENCE

Appeal from the Superior Court of Pima County Number A-22303
Honorable Jack G. Marks, Judge

Gary K. Nelson, The Attorney General
by Howard L. Fell, Assistant Attorney General
and Frank Leto, Third Year Law Student

Attorneys for Appellee

Ed P. Bolding, Former Pima County Public Defender
John M. Neis, Pima County Public Defender
by Richard Van Duizend, Former Deputy Public Defender
and Jeffrey W. Hanes, Third Year Law Student

Attorneys for Appellant

The above cause was presented in your Court and was brought before the Court of Appeals, Division Two, No. 2 CA-CR 331, in the manner prescribed by law. That Court rendered its Opinion and caused the same to be filed on the 8th day of November, 1973. A Petition for Review was granted by this Court on the 22nd day of January, 1974.

- - - - - - - - - - - -

This cause having been heretofore submitted, and the Court having duly considered same, and being now advised in the premises, files its Opinion. It is accordingly ORDERED that the opinion of the Court of Appeals is vacated, and the judgment and sentence of the trial court entered in the above-entitled cause be affirmed, to comply with the Opinion of this Court, attached hereto.

DONE IN OPEN COURT this 16th day of April, 1974.

STATE OF ARIZONA
SUPREME COURT

I, CLIFFORD H. WARD, Clerk of the Supreme Court of the State of Arizona, hereby certify the above to be a full and true copy of the

Order Affirming Judgment and Sentence, made and entered in the above-entitled cause by said Court on the 16th day of April, 1974.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of said Court this 22nd day of May, 1974.

CLIFFORD H. WARD, Clerk

By Mary Adams Jackson
Chief Deputy Clerk

cc: Hon. Gary K. Nelson, Attorney General; Dennis DeConcini, Pima County Attorney; Hon. Jack G. Marks, Judge; Hon. Ben C. Birdsall, Presiding Judge of Pima County; Department of Corrections; Superintendent of Arizona State Prison; John M. Neis, Pima County Public Defender; Michael J. Cassius aka Carl Jackson; Mrs. Elizabeth Urwin Fritz, Clerk of the Court of Appeals, Division Two.

IN THE SUPREME COURT OF THE STATE OF ARIZONA
En Banc

FILE
APR 16 197[illegible]
CLIFFORD H. W[illegible]
CLERK SUPREME COURT
BY

STATE OF ARIZONA,
Appellee,
v.
MICHAEL J. CASSIUS aka CARL JACKSON,
Appellant.

NO. 2567-PR

Appeal from the Superior Court of Pima County
Honorable Jack G. Marks, Judge
(Cause No. A-22303)

JUDGMENT AND SENTENCE AFFIRMED

Opinion of the Court of Appeals, Division Two,
21 Ariz. App. 78, 515 P.2d 903 (197[illegible]) Vacated

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- 1 -

HAYS, Chief Justice

The defendant, Michael J. Cassius, also known as Carl Jackson, appealed from a judgment finding him guilty of having committed a felony while free on his own recognizance, in violation of A.R.S. § 13-1598. The Court of Appeals reversed the trial court in State v. Cassius aka Jackson, 21 Ariz. App. 78, 515 P.2d 903 (1973). We granted the state's petition for review. We vacate the opinion of the Court of Appeals and affirm the judgment and sentence of the Superior Court.

Defendant, while free on his own recognizance on a burglary charge, was caught burglarizing a building less than three weeks after his release. Because of the second burglary, he was indicted on two counts: (1) first degree burglary, and (2) committing a felony while free on his own recognizance. As a result of a plea bargain, he pleaded guilty to the first count--the second burglary--and agreed to be tried on the second count with the evidence limited to the grand jury minutes and the stipulation that he was free on his own recognizance at the time of the second arrest. In return, the state dismissed the charges based on the first burglary. The trial judge sentenced him to one to two years in prison for the burglary, and imposed a consecutive sentence of one to three years after finding him guilty on Count 2.

On appeal, defendant raised two questions: (1) whether the second count was a violation of the double jeopardy clause of the state and federal constitutions, and (2) whether the second count was a violation of A.R.S. § 13-1641, which provides that a conviction and sentence for a criminal

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act bar a subsequent prosecution for the same act.

The Fifth Amendment to the United States Constitution provides that no person shall be twice put in jeopardy for the same offense. This prohibition is binding upon the states. Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). The Arizona Constitution, Art. 2 § 10, contains substantially the same language.

The fallacy of defendant's argument on the issue of double jeopardy is that we are not, in the instant case, dealing with the same offense. The first count charged him with burglary. The second count charged him with being convicted of a felony while free on his own recognizance. These offenses are entirely different.

The question of whether two offenses are the same, and the criteria for resolving that question, are set out in State v. Tinghitella, 108 Ariz. 1, 491 P.2d 834 (1971). There, we held that in order to constitute different offenses, no element of either offense may be an element of the other; i.e., the two offenses must not contain a common element. It is quite obvious that the two offenses with which defendant was charged have no common element.

The federal courts use a different test, less favorable to the defendant. They hold that the offenses charged are not the same if each contains an element not contained in the other. Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). It is, therefore, perfectly clear that double jeopardy is not a viable defense in this case. These matters are analyzed in 14 Arizona Law Review 513.

Defendant's second point is that the conviction and

sentence under A.R.S. § 13-1580 violates A.R.S. § 13-1641 which reads:

> "An act or omission which is made punishable by different sections of the laws may be punished under either, but in no event under more than one. An acquittal, or conviction and sentence under either one bars a prosecution for the same act or omission under any other."

The material part of A.R.S. § 13-1580 reads:

> "A person who is convicted of committing any felony offense . . . which felony offense is committed while such person is released . . . on his own recognizance on a separate felony charge, is guilty of the offense of committing a felony while released on . . . his own recognizance, and upon conviction . . . shall be punished by imprisonment . . . for not more than five years."

It is, of course, obvious that these two sections can be read as contradictory unless some sort of statutory construction is applied to them, since a person who commits a felony while free on his own recognizance, may be guilty of two felonies under § 13-1580.

We will not assume that the legislature, in enacting a statute, was unaware of an existing statute. Arizona State Board of Directors v. Phoenix Union High School Dist., 102 Ariz. 69, 424 P.2d 819 (1967). Where statutes in pari materia are in apparent conflict, they should be construed in harmony so as to give force and effect to each. State Land Dept. v. Tucson Rock & Sand Co., 107 Ariz. 74, 481 P.2d 867 (1971). Where a later statute does not expressly repeal a former one, they should be construed so as to give effect to each, if possible. State v. Jaastad, 43 Ariz. 458, 32 P.2d 799 (1934). When dealing with separate statutes, the court must construe them so as to give meaning to both, if possible. Finch v. State Department of Public Welfare,

the legislature did not intend to do a foolish thing by including in a statute a provision which is nonoperative or invalid. Kelly v. Bastedo, 70 Ariz. 371, 220 P.2d 1069 (1950). Where a statute first expresses a general intent, and later an inconsistent particular intent, such particular intent will be taken as an exception to the general intent, and both will stand. Sakrison v. Pierce, 66 Ariz. 162, 185 P.2d 528 (1947).

We believe the application of these rules should and does lead us to the conclusion that the legislature intended to engraft § 13-1580 onto § 13-1641 as an exception so that the two statutes should be read to mean that for one act there may be only one prosecution except when it is committed while the accused is out of jail on his own recognizance. Read in this way, neither quoted section conflicts with the other, and each is given full effect. We therefore hold that the position taken by defendant in his second point is untenable.

Ordinarily, covering all of the points made by defendant in his appeal brief disposes of the appeal and points the way to the final disposition, unless a search of the record discloses some fundamental error not raised by defendant. We have examined the record for fundamental error and find none. However, we note that the Court of Appeals also examined the record for fundamental error and found that it existed in the form of a violation of the equal protection clause of the state and federal constitutions. The court's holding is based on the argument that A.R.S. § 13-1580 creates two classes of persons and treats them differently. The court felt that

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of that class to be convicted of a crime, while the class which has not exercised the right to bail is not so restricted. We completely disagree with this reasoning.

While it is true that the right to bail has a constitutional basis, it has always been recognized that limitations may be imposed upon it. Generally, bail is granted on condition that the defendant stay within the court's jurisdiction and that he conduct himself as a law-abiding citizen. Rule 7.3 of the new Rules of Criminal Procedure, 17 A.R.S., makes this last requirement mandatory. There has never been any doubt that these are legitimate conditions. The Court of Appeals felt that our statute has the effect of chilling the assertion of the constitutional right to bail by penalizing those who choose to exercise that right, but merely requiring that a man abide by the law is not a chilling limitation; it is a requirement that he is obligated to follow whether or not on bail, and it existed even before bail was granted.

The opinion of the Court of Appeals recognizes that it would be constitutional to increase the punishment for a crime committed while out on bail! We fail to see the distinction. As a matter of fact, we have a recidivist statute, enhancing the punishment of defendants who have prior convictions, and it has never been held to be a violation of the equal protection clauses. In State v. Sanchez, 110 Ariz. 214, 516 P.2d 1226 (1973), we cited the following language of the United States Supreme Court.

"The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is done without any reasonable basis, and therefore is purely arbitrary." 516 P 2d at 1229.

* * *

"When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted, must be assumed." 516 P.2d at 1229.

* * *

"One who assails the classification in such a law must carry the burden of showing that it does not rest on any reasonable basis, but is essentially arbitrary. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S. Ct. 337, 340, 55 L. Ed. 369 (1911)." 516 P.2d at 1229.

It is true that, as the Court of Appeals points out, it is unconstitutional to legislate that different treatment be accorded to persons placed by statute into different classes, on the basis of criteria wholly unrelated to the objective of that statute. We see no application of that rule to this case.

The opinion of the Court of Appeals is vacated, and the judgment and sentence of the Superior Court are affirmed.

JACK D. H. HAYS, Chief Justice

CONCURRING:

JAMES DUKE CAMERON, Vice Chief Justice

FRED C. STRUCKMEYER, JR., Justice

LORNA E. LOCKWOOD, Justice

WILLIAM A. HOLOHAN, Justice

Supreme Court

State of Arizona

February 20, 1974

THE STATE OF ARIZONA, Appellee, v. MICHAEL J. CASSIUS aka CARL JACKSON, Appellant.	)	Supreme Court No. 2867-PR Court of Appeals No. 2 CA-CR 231 Pima County No. A-22393

The following action was taken by the Supreme Court of the State of Arizona on February 19, 1974 in regard to the above-entitled cause:

"ORDERED: Request for Oral Argument = Denied.

FURTHER ORDERED: Motion for Leave to Submit Authorities = Granted.

FURTHER ORDERED: Defendant granted 30 days in which to submit said authorities."

CLIFFORD H. WARD, Clerk

By Mary Ann Stephens
Deputy Clerk

TO: Ed Bolding, Pima County Public Defender, 45 West Pennington, Tucson, Arizona 85701 ATTN: Frederick S. Klein, Esq.
Hon. Gary K. Nelson, The Attorney General, 159 Capitol Building, Phoenix, Arizona 85007 ATTN: Grove M. Callison, Esq.
Howard L. Fell, Assistant Attorney General, 415 West Congress, Tucson, Arizona 85701

dkb

Supreme Court

State of Arizona

FILED: January 23, 1974

CORRECTED COPY

THE STATE OF ARIZONA, Appellee,	Supreme Court No. 2867-PR
v.	Court of Appeals No. 2 CA-CR 331
MICHAEL J. CASSIUS aka CARL JACKSON, Appellant.	Pima County No. A-22303

The following action was taken by the Supreme Court of the State of Arizona on January 22, 1974 in regard to the above-entitled cause:

"ORDERED: Petition for Review - Granted."

The Supreme Court has adequate sets of briefs. Therefore, no additional briefs will be necessary.

CLIFFORD H. WARD, Clerk

By Mary Ann Hughes
Deputy Clerk

TO: Gary K. Nelson, The Attorney General, 159 Capitol Building, Phoenix, Arizona 85007 ATTN: Grove M. Callison, Esq.
Howard L. Fell, Assistant Attorney General, 415 West Congress, Tucson, Arizona 85701
Ed Bolding, Pima County Public Defender, 45 West Pennington, Tucson, Arizona 85701 ATTN: Richard Van Duizend, Esq.
Hon. Jack G. Marks, Judge of the Pima County Superior Court, Pima County Courthouse, Tucson, Arizona 85701
Mrs. Elizabeth Urwin Fritz, Clerk of the Court of Appeals, Div. 2, 415 West Congress, Tucson, Arizona 85701
West Publishing Company, 50 Kellogg Boulevard, St. Paul, Minn. 55102

dkb

THE STATE OF ARIZONA, Appellee,	2 CA-CR 331
v.	O R D E R
MICHAEL J. CASSIUS, aka CARL JACKSON, Appellant.	Pima County Superior Court Cause No. A-22303

IT IS ORDERED that the Motion for Rehearing be, and the same hereby is, denied.

Dated: December 11, 1973.

James D. Hathaway, Chief Judge

Lawrence Howard, Judge

Herbert F. Krucker, Judge

Copies to:

Ed Bolding, Esquire
Pima County Public Defender
Attention Richard Van Duizend, Esquire
Deputy Public Defender
Third Floor, Pioneer Title Building
45 West Pennington
Tucson, Arizona 85701

The Honorable Gary K. Nelson
The Attorney General
State Capitol Building
Phoenix, Arizona 85007

The Honorable Dennis DeConcini
County Attorney, Pima County
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THE STATE OF ARIZONA, Appellee, v. MICHAEL J. CARLOS aka CARL JACKSON, Appellant.	)	NO. 2 CA-CR 931 O R D E R RE: PIMA County Superior Court Cause No. A-22303

Gary K. Nelson, The Attorney General — Phoenix
by Howard L. Fell, Assistant Attorney General, and Frank Leto, Certified Third-Year Law Student under Rule 28(e) — Tucson

Attorneys for Appellee

Ed Bolding, Pima County Public Defender — Tucson
by Richard Van Duizend, Assistant Public Defender, and Jeffrey W. Hares, Certified Third-Year Law Student under Rule 28(e)

Attorneys for Appellant

The above-entitled matter was duly submitted to the Court. The Court has this day rendered its opinion.

IT IS ORDERED that the opinion be filed by the Clerk, and, under the Rules of the Supreme Court, Rule 47(e), fifteen days are allowed from this date to file a Motion for Rehearing.

IT IS FURTHER ORDERED that a copy of this order, together with a copy of the opinion, be sent to each party appearing or the attorney for such party and to the Honorable Jack G. Marks, Judge.

Dated: November 8, 1973.

Lawrence Howard
Lawrence Howard
Acting Chief Judge

Copies mailed as directed this
8th day of November, 1973.

Elizabeth Urwin Fritz
Elizabeth Urwin Fritz, Clerk.

CLERK COURT OF APPEALS
Division Two

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MICHAEL J. CASSIUS aka CARL JACKSON, Appellant.	)	No. 2 CA-CR 331 O P I N I O N

Appeal from the Superior Court of Pima County
Cause No. A-22303

Honorable Jack G. Marks, Judge

REVERSED

Gary K. Nelson, The Attorney General — Phoenix
by Howard L. Fell, Assistant Attorney General — Tucson
and Frank Leto, Certified Third-Year Law Student
under Rule 28(e)

Attorneys for Appellee

Ed Bolding, Pima County Public Defender — Tucson
by Richard Van Duizend, Assistant Public Defender
and Jeffrey W. Hanes, Certified Third-Year Law Student
under Rule 28(e)

Attorneys for Appellant

K R U C K E R, Judge.

This is an appeal from a judgment of conviction and sentences on one count of burglary, first degree, A.R.S. § 13-302, and one count of committing a felony while released on bail or on own recognizance on a separate felony charge, A.R.S. § 13-1580.

The peculiar facts of this case are: On October 17, 1972, appellant, Michael Jerome Cassius, was arrested and charged with burglary, Cause No. A-22479. The following day, he was released on his own recognizance.

On November 4, 1972, while released on his own recognizance on the first burglary charge, appellant was again arrested for burglary and was charged in Cause No. A-22303 on two counts: Count I, violation of A.R.S. § 13-302 (burglary, first degree) and Count II, violation of A.R.S. § 13-1580 (committing a felony while released on bail or on own recognizance on a separate felony charge).

Proceedings were held on both burglary charges on January 4, 1973. At that time, Cause No. A-22479 was dismissed upon motion of the County Attorney. In Cause No. A-22303, appellant plead guilty to Count I, burglary, and Count II was submitted to the court on the basis of the Grand Jury transcript and stipulation of counsel that at the time of the second burglary appellant was released on his own recognizance in Cause No. A-22479. The court accepted appellant's guilty plea on Count I and found him guilty on Count II.

On January 22, 1973, appellant was sentenced to imprisonment for one and not more than two years on Count I and a consecutive term of not less than one nor more than three years was imposed for the Count II conviction. This appeal followed.

Appellant submits two questions for review:

1. Whether appellant's conviction for violation of A.R.S. § 13-1580 (committing a felony while released on bail or on own recognizance) constituted double jeopardy under the Fifth Amendment of the United States Constitution and Art. 2 § 10 of the Arizona Constitution?

2. Whether the sentence imposed pursuant to A.R.S. § 13-1580 violated the statutory proscription of A.R.S. § 13-1641 against double punishment for the same offense?

Before we dispose of the issues raised by appellant, we first consider the State's contention that the issues of double jeopardy and double punishment were not raised below, therefore,

nent affect substantial rights requiring this court on its own initiative to notice the defects. We agree with appellee that the double jeopardy issue is not preserved for appeal. However, we find the issue of double punishment properly submitted for review.

Generally, in Arizona the issue of double jeopardy must not be raised for the first time on appeal. State v. Veres, 7 Ariz.App. 117, 436 P.2d 629 (1968), cert.den. 393 U.S. 1014. The purported stipulation relied on by appellant is the following statement of the prosecutor:

> "MR. HOWARD: The charge in count 2 is committing a felony while released on his own recognizance on another felony charge, Your Honor, and the public defender would like to reserve their right to examine that Statute on appeal, so are reluctant to enter a plea at this point, and would prefer to submit it to the Court on the stipulated facts in the Grand Jury transcript, and there are certain matters which I will ask the Court to take judicial notice of from the Court file."

We find this insufficient to preserve the double jeopardy issue for review.

Appellant also asserts that he had no opportunity to raise this issue at the trial court level. We find no merit in this argument. Appellant, after having been found guilty on Count I, made no attempt to utilize Rule 177, Rules of Criminal Procedure, 17 A.R.S.[1/] as to Count II on the grounds of prior conviction or double jeopardy. Appellant's failure to raise the issue of double jeopardy below precludes appellate consideration of such issue.

As to the issue of double punishment, however, it may be raised for the first time on appeal. State v. Mills, 96 Ariz. 377, 396 P.2d 5 (1964). We therefore turn our attention to

---

[1/] This case is decided on the law as it existed prior to September 1, 1973.

appellant's contention that the sentences imposed on Count I and Count II constituted double punishment in violation of A.R.S. § 13-1641, which provides:

> "An act or omission which is made punishable in different ways by different sections of the laws may be punished under either, but in no event under more than one. An acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other."

Prior to the Supreme Court decisions in State v. Mitchell, 106 Ariz. 492, 478 P.2d 517 (1970), and State v. Tinghitella, 108 Ariz. 1, 491 P.2d 834 (1971), there appeared to be some confusion in applying A.R.S. § 13-1641. However, as formulated in Mitchell, supra, and adopted in Tinghitella, supra, an "identical elements" test is the standard, requiring elimination of the elements in one charge and a determination of whether the facts left support the other charge. See also, State v. Horton, 108 Ariz. 16, 492 P.2d 395 (1972); State v. George, 108 Ariz. 5, 491 P.2d 838 (1971); and State v. Bartky, 16 Ariz.App. 421, 493 P.2d 1226 (1972).

In spite of the seeming simplicity of this statute and the test, judicial interpretation and application to a given set of facts has proven to be a complex task. This case is no exception.

Our review of the myriad of cases dealing with the application of A.R.S. § 13-1641 sheds no light on the problem sub judice. We find no case with a factual posture remotely similar to this case. However, there is one common denominator -- the purpose of the subject statute is to protect an offender against double punishment for a single act which violates more than one statute. See, Mitchell, supra; State v. Andrews, 106 Ariz. 372, 476 P.2d 673 (1970); State v. Ballez, 102 Ariz. 174, 427 P.2d 125 (1967); and State v. Hutton, 87 Ariz. 176, 349 P.2d 187 (1960).

As previously noted, appellant, in Cause No. A-22303, was found guilty and sentenced on two counts: Count I, violation

of A.R.S. § 13-302, and Count II, violation of A.R.S. § 13-1580. The pertinent provisions of these statutes are:

"§ 13-302. Definition and degrees of burglary; punishment

A. A person entering a building, dwelling house, office, room, apartment, tenement, shop, warehouse, store. . . with intent to commit grand or petty theft, or any felony. . . is guilty of burglary.

B. Burglary committed in the nighttime is burglary of the first degree, punishable by imprisonment in the state prison for not less than one nor more than fifteen years."

"§ 13-1580. Committing felony while on bail on felony charge; penalty

A person who is convicted of committing any felony offense, whether federal or state, which felony offense is committed while such person is released on bail or his own recognizance on a separate felony charge is guilty of the offense of committing a felony while released on bail or his own recognizance and upon conviction of such crime shall be punished by imprisonment in the state prison for not more than five years. Such penalty shall be in addition to and shall be served consecutively to any penalty imposed for the offense committed while released on bail or on his own recognizance."

The elements necessary to prove Burglary, first degree, are: (1) an entry, (2) with intent to commit a felony, and (3) commission in the nighttime. A violation of A.R.S. § 13-1580 requires (1) a conviction of committing any felony, (2) which is committed while a person is released on bail or his own recognizance on a separate felony charge.

Appellant's only act was the burglary of November 4, 1972, which was committed while he was released on his own recognizance on a separate felony charge. For this single act, he has been convicted and sentenced for two felony offenses. If one or all of the elements of burglary are eliminated, what facts are left to support the charge under A.R.S. § 13-1580? There are none. We find no other act by appellant, hence no support for a charge under A.R.S. § 13-1580. The factual basis for conviction under either statute is the same act on the part of appellant.

The State, however, argues that the elements of A.R.S. § 13-1580 are different, i.e., (1) commission of a felony and (2) such felony having been committed during a designated period. We find such argument specious. The "conviction" element is a prior act, not appellant's, leaving only the burglary as the act of appellant. To adopt the State's construction would defeat the very purpose of A.R.S. § 13-1641 and allow the prosecution to accomplish indirectly that which cannot be done directly.

Application of the "identical elements" test enunciated by our Supreme Court would mandate the conclusion that the statutory prescription of A.R.S. § 13-1641 has been violated. However, to so hold would render A.R.S. § 13-1580 completely inoperative. We must presume that the legislature did not intend to do a futile act in enacting A.R.S. § 13-1580. Campbell v. Superior Court, 105 Ariz. 252, 462 P.2d 801 (1969). We also assume that the legislature was aware of the existence of A.R.S. § 13-1641 and therefore that A.R.S. §§ 13-1641 and 13-1580 were intended to operate as a compatible whole. See, Arizona State Board of Directors v. Phoenix Union High School District, 102 Ariz. 69, 424 P.2d 819 (1967). It must, therefore, have been the intention of the legislature to except from A.R.S. § 13-1641 the later-enacted A.R.S. § 13-1580. However, whether or not such exception was intended, we are of the opinion that A.R.S. § 13-1580 is violative of the equal protection clause of the 14th Amendment to the United States Constitution.

Initially we note that appellant did not attack the constitutionality of A.R.S. § 13-1580 in the trial court. Generally, constitutional questions must first be presented to the trial court for determination. Porter v. Eyer, 80 Ariz. 169, 294 P.2d 661 (1956). However, fundamental error is such error as goes to the foundation of the case, or which takes from a defendant a right essential to his defense, State v. Pulliam, 87 Ariz. 216, 349 P.2d 781 (1960), and we must search the record

rights, principally those affecting constitutional rights, solely to prevent a miscarriage of justice. State v. Gilreath, 107 Ariz. 218, 487 P.2d 385 (1971).

As stated in State v. Pugh, 31 Ariz. 317, 252 P. 1013 (1927):

> "But where for any constitutional reason the law under which a party is being prosecuted is void, the question need not be formally raised, as when that fact is discovered by the court, even on appeal, it will be considered." 31 Ariz. at 319.

Therefore, in accordance with our absolute duty to protect constitutional rights, Marquez v. Rapid Harvest Co., 1 Ariz.App. 562, 405 P.2d 814 (1965), and to prevent a miscarriage of justice, we raise the constitutionality of A.R.S. § 13-1580 ex mero motu.

Since this case involves a crime relating to bail and the release of one on his own recognizance, it is important to understand the nature and purpose of bail. In Arizona, bail is a constitutionally protected right. Art. 2 § 22 of the Arizona Constitution provides:

> "All persons charged with crime shall be bailable by sufficient sureties, except for:
>
> 1. Capital offenses when the proof is evident or the presumption great.
>
> 2. Felony offenses, committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge."

Although bail is conditioned upon the giving of "sufficient sureties," Rendel v. Mummert, 106 Ariz. 233, 474 P.2d 824 (1970), it is nonetheless a constitutionally protected right. As stated in Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951):

> "This traditional right to freedom before conviction permits the unhampered preparation

of a defense, and serves to prevent the infliction of punishment prior to conviction. Proper regard for this right demands that it be preserved, the traditional way in which, consistent with good conscience, it can be made sure." 72 S.Ct. at 3.

Bail is erected for the sole purpose of securing attendance of the defendant in court at all times when his presence may be lawfully required, and his surrendering himself in execution of any lawful judgment that may be pronounced against him. Cunico v. Boies, 72 Ariz. 369, 234 P.2d 440 (1951). When setting bail, the judge should take into account the defendant's prior arrests and convictions, his record of appearances at court proceedings, his record of flight to avoid prosecution, and his failure to appear at court proceedings. Rendel v. Mummert, supra. It is assumed that the threat of forfeiture of one's goods will be an effective deterrent to the temptation to breach the conditions of one's release. Brandy v. United States, ___U.S.___, 81 S.Ct. 197, ___L.Ed.2d___ (1960).

With this background, we turn to the constitutionality of A.R.S. § 13-1580. The basic principles governing application of the equal protection clause of the Fourteenth Amendment are familiar. As the Chief Justice recently explained in Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971):

> "In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. Barbier v. Connolly, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 (1885); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911); Railway Express Agency v. New York, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949); McDonald v. Board of Election Commissioners, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial

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[illegible]
[illegible]
[illegible]
258 [illegible], 4.5, 47 [illegible], 14 L.Ed. 989
(1 [illegible]). [illegible] at 402, 403

A.R.S. § 13-1580 creates two classes of accused persons and treats them differently. Thus the question is whether a different treatment of those on bail or their own recognizance as opposed to those remaining in jail bears a rational relationship to the objectives apparently sought to be advanced by the operation of A.R.S. § 13-1580.

This statute was not adopted from any other jurisdiction, and we know of no other jurisdiction with a similar one. Although there is no legislative history to shed light on the legislative intent, and we have not had the benefit of appellate argument thereon, it is evident that A.R.S. § 13-1580 has a two-fold objective: (1) deterrence of criminal activity on the part of individuals who have been released on bail or on their own recognizance, and (2) enhancement of punishment of those who engage in criminal activity while so released. Those objectives are clearly rational and reasonable. However, the operation of this statute transcend those objectives.

When the legislature enacted A.R.S. § 13-1580, it created a separate criminal offense -- the offense of committing a felony while released on bail or own recognizance. By statute, a class of individuals who have exercised their state constitutional right to bail has been singled out. As to these individuals, the legislature has declared it to be a crime to be convicted of a crime. On the other hand, had they failed to exercise their constitutional right and remained in jail, there can be no such crime.

A simple illustration will demonstrate how this statute operates. For example, A and B are both arrested and charged with burglary. A is released on bail and B remains in jail. While released, A commits aggravated battery on a police officer. While in jail, B also commits aggravated battery on a police officer.

Pursuant to [illegible], the criminal battery charges [illegible] both A and B are charged [illegible] battery charges. Therefore, the [illegible] of A and B have committed identical crimes, A may be convicted of two crimes: (1) aggravated battery and (2) committing a felony while released on bail or own recognizance. However, B can only be convicted of aggravated battery because his crime was committed in jail. Taking one step further, assume that A had been mistakenly accused and was totally innocent of the burglary charge. Under A.R.S. § 13-1580 he may still be convicted of two criminal offenses for the single battery solely because the act was committed while on bail. We fail to see any rational relationship between the objectives of A.R.S. § 13-1580 and its operation.

The Supreme Court of California in the case of In re King, 3 Cal.3d 226, 90 Cal.Rptr. 15, 474 P.2d 983 (1970), held unconstitutional a California statute which prescribed varying penalties between two categories of non-supporting fathers -- (1) those who remain out of state for 30 days and (2) those who do not. Under the statute, any father who remained out of the state of California for 30 days while not supporting his child was guilty of a felony and a father who committed the identical act of criminal nonfeasance, but happened to be within California, was guilty only of a misdemeanor. The court found this provision a denial of equal protection of the laws because it created additional criminal liability on an individual solely because he chose to remain outside the state. The court pointed out that:

> "'If a law has 'no other purpose' * * * than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' United States v. Jackson, 390 U.S. 570, 581, 88 S.Ct. 1209, 1216, 20 L.Ed.2d 138 (1968).'" 90 Cal.Rptr. at 21, 22

Similarly, in Spillers v. State, 84 Nev. 23, 436 P.2d 18 (1968), the Supreme Court of Nevada held unconstitutional a statute

which provided that a person convicted of rape could not be sentenced to death if the case were tried to the court, but death could be imposed if affixed by a jury verdict. The court stated:

> "A State may not prescribe different penalties for the same offense without violating the equal protection concept. Thus the statute is unconstitutional insofar as it allows a jury to impose a greater penalty than a court for the same offense, thus violating the Sixth and Fourteenth Amendments to the federal constitution, and Art. 2, § 3 of our State constitution." 436 P.2d at 23.

Although King and Saillens were not concerned with a state constitutional right to bail, they denounced exactly that which our statute attempts -- (1) the prescribing of different penalties for the same offense and (2) penalizing one for exercising a constitutional right. A.R.S. § 13-1580 not only prescribes different penalties for the same offense, but also creates an additional crime for the same offense, which crime can only be committed after one has exercised his constitutional right to bail.

As noted earlier, the sole purpose of bail is to secure the attendance of a defendant at trial. Making it an offense to be convicted of a felony which was committed while on bail neither helps secure the attendance of a defendant at trial nor insures compliance with the legal processes of this State. It serves no other purpose than to make bail an instrument of oppression which our Supreme Court has denounced. Gusick, supra. Our legislature has effectively chilled the assertion of the constitutional right to bail by penalizing those who have chosen to exercise it.

Regardless of the character of the crime, an accused on bail is clothed with the presumption of innocence. Gusick, supra. By singling out those admitted to bail, A.R.S. § 13-1580 strips the innocent of that presumption. One accussed of a crime is not ipso facto a menace to society as A.R.S. § 13-1580 seems to presume. Such a presumption erodes the very foundation of our system of criminal justice, namely, the presumption of innocence.

If one is in fact a person to society, adequate means for the devices already exist. Art. 2 § 22 of our constitution is designed to protect society from the dangerous. Paragraph 2 of that section denies bail, under designated circumstances, to a person who commits a felony while admitted to bail. A court may in its discretion set a higher bail for a defendant having recidivist tendencies. Release from custody is conditioned on good behavior while so released, A.R.S. § 13-1577(D), and upon a breach of such condition, bail may be revoked. A.R.S. § 13-1578; Rendel, supra.

To achieve the objectives of A.R.S. § 13-1580, there is a reasonable way available with a lesser burden on the constitutionally protected right to bail. As was done in the District of Columbia[2/] the legislature could enact a law enhancing the punishment of those who commit a felony while released on bail or own recognizance. Unlike our statute, in the District of Columbia it is not a crime to commit a crime while released on bail.

Although we need not decide the question of inverse discrimination, it should be noted that in Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970), it was recognized that if a wrongdoer were insulated from punishment because of indigency, equal protection would be denied the offender who is

---

[2/] D.C. Code Ann., § 23-1328 (1971), provides:

> "Penalties for offenses committed during release
>
> (a) Any person convicted of an offense committed while released pursuant to section 23-1321 shall be subject to the following penalties in addition to any other applicable penalties:
>
> (1) A term of imprisonment of not less than one year and not more than five years if convicted of committing a felony while so released; and
>
> (2) A term of imprisonment of not less than ninety days and not more than one year if convicted of committing a misdemeanor while so released.
>
> (b) The giving of a warning to the person when

(Footnote 2 continued on page 13)

punished. The Supreme Court stated:

> "The State is not seeking to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to invidious discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction." 90 S.Ct. at 2024.

Under A.R.S. § 13-1580, one on bail or own recognizance is punished twice for one act, whereas the person who cannot afford bail is insulated from such double punishment even though he committed the identical act. The indigent who cannot afford bail is subject to a single charge.

We agree that the legislative objective in enacting A.R.S. § 13-1580 is commendable, but it is unfortunate that, as written, it cannot withstand constitutional scrutiny. We therefore hold that A.R.S. § 13-1580 is unconstitutional and appellant's conviction on Count II cannot stand. The judgment of conviction and sentence imposed thereon are ordered vacated.

HERBERT F. KRUCKER, Judge

CONCURRING:

JAMES D. HATHAWAY, Chief Judge

LAWRENCE HOWARD, Judge

(Footnote 2 continued)

> released of the penalties imposed by this section shall not be a prerequisite to the application of this section.
>
> (c) Any term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment."

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Supreme Court, U. S.
FILED
NOV 22 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5140

MICHAEL J. CASSIUS,

Petitioner,

—v.—

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

PETITION FOR CERTIORARI FILED AUGUST 13, 1974
CERTIORARI GRANTED OCTOBER 15, 1974

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5140

MICHAEL J. CASSIUS,

Petitioner,

—v.—

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

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Order of the Arizona Supreme Court granting leave to defendant to submit additional authorities, reflecting action taken on February 19, 1974 45

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Order of the Supreme Court of the United States granting Petition for a Writ of Certiorari and Motion for Leave to Proceed in Forma Pauperis, Filed October 15, 1974 54

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 18, 1972—Complaint filed in Pima County, Arizona Justice Court No. 2, charging defendant and another man with burglary of a motor vehicle; defendant released on his own recognizance.

November 6, 1972—Complaint filed in Pima County, Arizona Justice Court No. 2, charging defendant with burglarly and committing a felony while on bail or recognizance on a felony charge; bond set at $2000.

November 14, 1972—Indictment returned charging defendant with burglary and committing a felony while on bail or recognizance on a felony charge (same case as complaint filed on November 6, 1972) (A-22303).

December 12, 1972—Indictment returned charging defendant and another man with burglary of a motor vehicle (same case as complaint filed October 18, 1972) (A-22479).

January 4, 1973—Defendant pleaded guilty to charge of burglary in Case No. A-22303; was found guilty in trial on stipulated facts of charge of committing a felony while on bail or recognizance on a felony charge (Case No. A-22303); charge in A-22479 is dismissed on motion of the State.

January 22, 1973—Defendant sentenced to imprisonment for not less than one nor more than two years on burglarly charge and to imprisonment for a consecutive term of not less than one nor more than three years on charge of committing a felony while on bail or recognizance on a felony charge.

March 21, 1973—Notice of appeal filed.

November 8, 1973—Opinion of the Arizona Court of Appeals filed, vacating judgment of conviction and sentence for charge of committing a felony while on bail or recognizance on a felony charge.

December 11, 1973—Arizona Court of Appeals denied State's Motion for Rehearing.

January 23, 1974—Arizona Supreme Court granted State's Petition for Review.

February 20, 1974—Arizona Supreme Court granted Defendant's Motion for Leave to submit additional written argument.

April 16, 1974—Opinion of the Arizona Supreme Court filed vacating decision of Arizona Court of Appeals and affirming the judgment and sentence of the trial court.

May 21, 1974—Arizona Supreme Court denied Defendant's Motion for Rehearing.

August 13, 1974—Petition for a Writ of Certiorari and Motion for Leave to Proceed in Forma Pauperis docketed in the Supreme Court of the United States.

October 15, 1974—Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari granted by the Supreme Court of the United States.

Precinct No. Two

IN THE JUSTICE COURT OF THE
STATE OF ARIZONA

COUNTY OF PIMA

No. 33836

STATE OF ARIZONA, PLAINTIFF,

vs.

ROY MOORE AND MICHAEL JEROME CASSIUS,
DEFENDANT(S)

Filed Oct. 18, 1972

CRIMINAL COMPLAINT

Felony

The undersigned having appeared personally and having been duly sworn does, upon information and belief, accuse ROY MOORE and MICHAEL JEROME CASSIUS and charges that in Pima County:

(BURGLARY)

On or about the 17th day of October 1972, ROY MOORE and MICHAEL JEROME CASSIUS committed burglary of the motor vehicle of ALEX DESOTO, a 1967 Chevrolet Van, white in color, Arizona License for 1972, JC 2125, VIN GS157P112680, all in violation of A.R.S. Section 13-302, as amended.

[Signatures and Subscription omitted in printing]

Precinct No. Two

IN THE JUSTICE COURT OF THE
STATE OF ARIZONA
COUNTY OF PIMA

No. 33907

STATE OF ARIZONA, PLAINTIFF,

vs.

MICHAEL J. CASSIUS, DEFENDANT(S)

Filed Nov. 6, 1972

CRIMINAL COMPLAINT

Felony

The undersigned having appeared personally and having been duly sworn does, upon information and belief, accuse MICHAEL J. CASSIUS and charges that in Pima County:

COUNT ONE (BURGLARY)

On or about the 4th day of November 1972, MICHAEL J. CASSIUS committed burglary of a store located at 200 South Park, Pima County, all in violation of A.R.S. Section 13-302, as amended.

COUNT TWO (COMMITTING FELONY WHILE ON BAIL OR OWN RECOGNIZANCE)

On or about the 4th day of November 1972, MICHAEL J. CASSIUS, while released on bond or his own recognizance on the felony charge of Burglary, Justice Court No. Two, No. 33836, committed the crime of Burglary, in violation of A.R.S. Section 13-1580.

[Signatures and Subscription omitted in printing]

BEFORE THE PIMA COUNTY GRAND JURY
TUCSON, ARIZONA

No. A-22303

7 GJ-179

STATE OF ARIZONA, PLAINTIFF,

vs.

MICHAEL J. CASSIUS, AKA CARL JACKSON, ACCUSED.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Filed Dec. 14, 1972

Proceedings had in the above-entitled matter before the Pima County Grand Jury in secret session on the 14th day of November, 1972, sitting in Courtroom No. 5 of the Superior Court, Tucson, Arizona.

PRESENT:

MR. GERARD R. O'MEARA
MR. TERRY G. DONALDSON
Deputy County Attorneys

[2] THE FOREMAN: We will go back on the record then. Do you have another case?

MR. O'MEARA: 7GJ-179, Cassius.

THE FOREMAN: 7GJ-179. The accused name is Cassius, Michael J., also known as Jackson, Carl. The charge is burglary, committing a felony while on bail or on own recognizance. The witnesses will be Officer Lanier and Officer Malm, M-a-l-m. Do any members of the grand jury know any of these people or feel they should be excused from considering this case?

Do you have a witness, sir?

MR. O'MEARA: Malm.

RICHARD MALM,

called as a witness before the grand jury, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. O'MEARA

THE FOREMAN: Sit there and speak into the mike, please.

MR. O'MEARA: Q Officer, will you state your name and occupation. A Richard Malm, patrolman, City of Tucson Police Department.

Q How long have you been with the Tucson [3] Police Department? A I have been with Tucson for a little over two years.

Q Were you with any other department before coming to Tucson? A Yes.

Q Which one and where? A Chicago, metropolitan area, for a little over six and a half years.

Q In what capacity are you presently employed with TPD? A I am with the service dog unit, the K-9 patrol of the city Police Department.

Q How long have you been on the K-9 patrol? A Just three months.

Q Were you on duty on November 4, 1972? A Yes, sir.

Q Do you remember the hours you worked that day? A We worked from 8:00 p.m. until 4:00 a.m. in the morning.

Q Did you have occasion at any time on November 4, 1972, to investigate a scene located at 200 South Park? A Yes, sir.

Q What is at 200 South Park? [4] A A business by the name of Tires West.

Q Is that in Pima County? A Yes, it is.

Q Did you have your dog with you at that time? A Yes, sir, I did.

Q Would you explain to the grand jury how it was you came to 200 South Park on November 4, 1972? A

Officer Lanier of the City Police Department had responded to a burglar alarm at that location. After arriving there he called for the assistance of one of the dog units, and I was the closest to his location and responded.

Q What time was it you arrived? A Shortly before midnight.

Q Would you describe for the grand jury exactly what transpired when you got there? A Yes. When I arrived there Officer Lanier took me around to the back of the building. On the west side at the north corner there is an overhead door leading into the warehouse of the particular building where they store tires. He showed me where there had been a handle in the overhead door removed and he thought there had been entry into the building from that location.

[5] At that time he thought he had heard someone inside the building and requested a service dog to attempt to search the building.

Q So what transpired next? A I advised the subject, or advised the interior of the building that I was giving them five minutes to come out or I was going to take the dog in the building. There was no response, and after the time passed I entered the building with my dog, searched the building. He located a subject inside the building in the bathroom, in the area of the offices in the front of the building. The subject was consequently arrested for burglary.

Q This particular subject you located in the building, was he alone or were there other people in there with him? A He was the only subject located inside the building.

Q Did you learn his name that evening? A That evening he gave us the name of Carl Jackson.

Q Have you subsequently learned this individual's true name? A Yes. I believe it to be Michael J. Cassius.

[6] Q Now while you were at the scene did you observe any other doors or windows at that particular establishment? A Yes, sir. After my dog alerted Mr. Jackson, or Cassius, as you will, he was removed from the

scene and the entire building was researched by myself and one other service dog unit.

Q Did you find anybody? A There was no one else in the building, but we did observe other doors and windows in the building, but we were unable to determine whether anybody else had been in the building with Jackson.

Q Were there any other places or points of entry that you were able to observe as you made your rounds that evening? A No, sir, there were not.

Q Just that one your originally found? A Yes, that is correct.

Q Officer Malm, did you at any time after that speak with any owner or manager or somebody in a managerial capacity with Tires West? A Yes, sir, I did.

Q With whom and when? A I believe it was Mr. Dick Smith, who is the owner of Tires West, and it was approximately an hour after I had searched the building and [7] arrested the subject. I had the desk, the Police Department desk call the owner of the business, and he responded to check the business with me to determine if there was a loss and to attempt to determine what the condition of the door was prior to the alarm.

Q What was this man's response? A He stated that upon his leaving earlier in the evening there was no damage to the particular door that was broken in to.

Upon searching the entire building with him after we had secured the building it was determined that numerous tires had been moved from their rows where they had normally been stored and placed in the middle of the store probably for removal by the subject.

Q Did Mr. Smith ever indicate to you, did he know Mr. Jackson or Mr. Cassius, whatever this man's name was? A He indicated to me at the time when I spoke with him during the investigation he thought he recognized him, but he wasn't sure and couldn't place the name. He asked me the subject's name and I advised him Carl Jackson, which was the name we knew him by at the time, and he stated he did not know Mr. Jackson by that name.

[8] Q Did he indicate whether of not he had given this particular individual, Mr. Jackson or Mr. Cassius, did he ever indicate whether or not he gave his permission to go in the building on that evening? A I asked him if he had. He said he not given anyone permission to be in it.

Q Now if you saw Mr. Cassius or Mr. Jackson, however he is known to you, if you saw this individual you found in the building that night, if you saw him again would you recognize him? A Yes, sir, I would.

Q Officer, isn't it also true that on November 4, 1972, that Mr. Cassius was released on his own recognizance, or he was on bond, in any event that he was in fact out and not in jail pending his connection with a felony charge of burglary in Justice Court number two, the case number being 33836? A It is my understanding through our records division and through the county attorney's records that he was in fact out on his own recognizance reference another felony charge. The case number and charge I am not familiar with.

Q Did you happen to have any conversation with this individual at the very time that you [9] apprehended him in the back part of the store? Did you say anything to him at that time? A I did not to him, but he did to me.

Q Would you indicate to the jury what it was he said to you? A Directly after my dog alerted on him I entered the bathroom, frisked him, handcuffed him. He asked me at that time—I don't know the exact words, but roughly, "How did you find out I was here? Does the building have an alarm or did someone see me come in?"

I did not at that time answer him nor did I advise him of his rights. My interest at the time was to find out if there was anyone else in the building.

I escorted him out of the building and turned him over to Officer Lanier on the exterior of the building and continued my search.

MR. O'MEARA: I have no further questions of this witness.

THE FOREMAN: Does any member of the grand jury have any questions to ask?

All right, sir. Thank you very much. You are excused. Well you step back out into the hall for a few moments?

(Witness excused.)

[10] THE FOREMAN: You have no more witnesses?

MR. O'MEARA: No.

THE FOREMAN: The charge is burglary and committing a felony while on bail or on his own recognizance. Is ther [sic] any question from any member of the grand jury on the law in this case?

All right. Then if the county attorneys and the court reporter will leave the room we will discuss the evidence presented.

(Whereupon the grand jury deliberated in secret session in the absence of counsel and the court reporter.)

THE FOREMAN: All right, sir. Let the record show in the case 7GJ-179, the accused, Michael J. Cassius, also known as Carl Jackson, charged with burglary and committing a felony while on bail or on his own recognizance, the grand jury voted a true bill evelen to zero.

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

No. A22303

STATE OF ARIZONA, PLAINTIFF,

vs.

MICHAEL J. CASSIUS, AKA CARL JACKSON, DEFENDANT(S)

INDICTMENT

Filed Nov. 14, 1972

The grand jurors of the county of Pima, in the name of the state of Arizona, and by its authority accuse MICHAEL J. CASSIUS, aka CARL JACKSON and charge that in Pima County:

COUNT ONE (BURGLARY)

On or about the 4th day of November, 1972, MICHAEL J. CASSIUS, also known as CARL JACKSON, committed burglary of a store located at 200 South Park, Pima County, all in violation of A.R.S. Section 13-302, as amended.

COUNT TWO (COMMITTING FELONY WHILE ON BAIL OR OWN RECOGNIZANCE)

On or about the 4th day of November, 1972, MICHAEL J. CASSIUS, also known as CARL JACKSON, while released on bond or his own recognizance on the felony charge of burglary, Justice Court No. Two, No. 33836, committed the crime of burglary, in violation of * * *

[Signatures Omitted in Printing]

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

No. A-22303

STATE OF ARIZONA, PLAINTIFF,

vs.

MICHAEL J. CASSIUS, DEFENDANT.

January 4, 1973

REPORTER'S TRANSCRIPT

Filed April 9, 1973

APPEARANCES:

JIM HOWARD, Esq., for the Plaintiff
JOHN HAWKINS, Esq., for the Defendatt [sic]

The above-entitled matter came on for hearing before the Honorable Jack C. Marks, Judge of the above-entitled Court, on the 4th day of January, 1973, and the following proceedings were had, to-wit:

PROCEEDINGS

THE COURT: State of Arizona, plaintiff, versus Michael J. Cassius, also known as Carl Jackson, defendant, A-22303, and State of Arizona, [2] plaintiff, versus Michael Jerome Cassius, defendant, A-22479.

Is the State ready? MR. HOWARD: State's ready, Your Honor.

THE COURT: Is the defendant ready? MR. HAWKINS: Yes, Your Honor.

THE COURT: What's before the Court, sir? MR. HAWKINS: Your Honor, this is the time set for a change of plea, and a plea bargain which has been worked out by Mr. Howard and me, whereby Mr. Cassius will

enter a plea to count 1 of A-22303, count 2 of the same number, A-22303, will be submitted to the Court on the basis of the Grand Jury transcript in that case, and a stipulation between counsel as to Mr. Cassius' release earlier on the charge in A-22479.

In addition, A-22479 will be dismissed and no other charges will be filed, and Mr. Howard will correct anything I have stated.

THE COURT: Mr. Howard, I understand everything except in relation to count 2 of the indictment in A-22303. MR. HOWARD: The charge in count 2 is committing a felony while released on his own recognizance on another felony charge, Your Honor, and the public defender would like to reserve their [3] right to examine that Statute on appeal, so are reluctant to enter a plea at this point, and would prefer to submit it to the Court on the stipulated facts in the Grand Jury transcript, and there are certain matters which I will ask the Court to take judicial notice of from the Court file.

THE COURT: Spell out those facts now, then, please? MR. HOWARD: Okay.

The facts that we stipulate to are: That that, and correct me if I am wrong, that the defendant was released on his own recognizance in Case Number A-22479 on the 18th of October, 1972, by the Justice Court, and remained released in that case until today.

That would be the stipulated fact, and I would ask the Court to take judicial notice of defendant's plea in A-22303, judicial notice that burglary is a felony in the State of Arizona.

Judicial notice that the burglary in A-22303 was one which happened on the 4th of November, or that pleadings and the Grand Jury transcript says it happened on the 4th of November, 1972. Judicial notice that the complaint filed in A-22479 was burglary and thus a felony, and judicial notice that the defendant was ordered [4] released—well, we have stipulated to that.

He was ordered released ROR on the 18th of October, 1972, and remained released until today.

THE COURT: I have great difficulty in understanding that last stipulation, though. He wasn't ordered re-

leased. A summons was issued for him and he was permitted to remain at liberty on his own recognizance, but there is nothing in the file that indicates that. MR. HOWARD: That Superior Court file does not reflect the release issued by the magistrate.

This particular case was instigated in the beginning or started by complaint filed in the Justice Court, and the Justice Precinct ordered him on this first appearance on the 18th of October and he was released on his own recognizance, and I have a witness here to put on to prove that.

To save time, we have decided to stipulate to that. It's not in the file, but it probably should be.

THE COURT: That's the reason I am saying, but if you stipulate to it, it's a fact, and do you so stipulate, Mr. Hawkins? MR. HAWKINS: Yes, I do, Your Honor.

[5] THE COURT: Very well. Then I'll take the plea on count 1 in A-22303, and it seems to me I can rule right away unless there is something in the Grand Jury transcript that's going to be different than what you have told me. Is there? MR. HAWKINS: I don't think so, Your Honor.

THE COURT: Are the facts before me now? MR. HOWARD: I think with the judicial notice the Court can take of those matters, I think you have all the facts, yes.

THE COURT: Then will you withdraw that portion of the stipulation relating to the transcript and I'll rule right away, because I think there's sufficient—

MR. HOWARD: Yes.

MR. HAWKINS: Yes.

THE COURT: All right. Show that portion of the stipulation has been withdrawn with leave of Court. I am going to read count 1 of the indictment to you in Case A-22303, Mr. Cassius, and ask you how you plead, guilty or not guilty.

Grand Jurors of the County of Pima, State of Arizona, and by its authority, accuse Michael J. Cassius, also known as Carl Jackson, [6] and charge that in Pima County, on or about the 4th day of November, 1972, Michael J.

Cassius, also known as Carl Jackson, committed burglary of a store located at 200 South Park, Pima County, on violation of ARS 13-302 as amended.

How do you plead? Guilty or not guilty to count 1 of the indictment filed on November 14, 1972, in Case Number A-22303? THE DEFENDANT: Guilty.

THE COURT: I would like you to answer some questions for me, please. Have you been advised and do you understand that you have a right to a speedy trial by a jury with respect to count 1 of this indictment, that you have a right to cross-examine witnesses who may testify against you and you have a privilege against you and you have a privilege against self-incrimination, that if you plead guilty and your plea is accepted by the Court, you are waiving such Constitutional rights and privileges? THE DEFENDANT: Yes.

THE COURT: Do you understand that you have a right to have an attorney present at the time of sentencing if your pleas of guilty are accepted? THE DEFENDANT: Yes.

[7] THE COURT: You understand that you are charged with the crime of burglary, in that in this County and State, on or about November 4, 1972, you committed a burglary of a store at 200 South Park? THE DEFENDANT: Yes.

THE COURT: Do you understand that burglary of a store means that you went in there with the intent to commit Grand or Petty Theft or other felony? THE DEFENDANT: Yes.

THE COURT: Did you do so? THE DEFENDANT: Yes.

THE COURT: What did you intend to do when you when into the 200 South Park? THE DEFENDANT: Steal some tires.

THE COURT: Thank you.

What would you value the tires at? THE DEFENDANT: Well, I didn't get a chance to rip them off.

THE COURT: You didn't get a chance to rip them off? THE DEFENDANT: Take them.

THE COURT: Who frustrated your chance? THE DEFENDANT: The Police Department.

THE COURT: Had you ripped them off, [8] what would they have been worth? THE DEFENDANT: That's hard to say, because I don't know when I would have stopped.

THE COURT: Well, since the burglary statute includes Petty and Grand Theft, I am not going to pursue this line of questioning any further.

You are pleading guilty because of some promise or representation by anyone as to what sentence the Court may impose upon you? THE DEFENDANT: No.

THE COURT: Are you pleading guilty because you have been threatened or coerced by someone to plead guilty? THE DEFENDANT: No.

THE COURT: Have any promises of any kind been made to you by anyone to induce the plea of guilty to Count 1 of A-22303, except, that if you do, the State would move to dismiss the indictment in case Number A-22479 and offer you an opportunity to plead not guilty to count 2, and on a stipulated set of facts, the Court would decide whether you are guilty or not on count 2? THE DEFENDANT: No.

MR. HAWKINS: And in addition to that, no additional charges.

[9] THE COURT: No additional charges will be filed. Is this as to the matters known or unknown or both? MR. HOWARD: As to any matters known, Your Honor.

THE COURT: As to any known matters. Very well. The answer is still no, right? THE DEFENDANT: Right.

THE COURT: Thank you. Was this a nighttime or a daytime burglary? THE DEFENDANT: Nighttime.

THE COURT: Therefore, I'll have to make a finding under the Rule that it's Burglary in the first degree, and the Court so finds.

The reason I have to do that is because the sentence varies. Do you understand that the sentence in the case of burglary in the first degree may be not less than one nor more than fifteen years in prison, in the State prison, or probation, based on the pre-sentence investigation report of the adult probation officer of this Court, which will be furnished to the Court prior to sentence? THE

DEFENDANT: Yes.

THE COURT: Have you discussed the facts or these cases, I should say, have you discussed [10] the facts of these cases and the entry of the plea of guilty to count 1 of the indictment in A-22303 with your attorney? THE DEFENDANT: Yes.

THE COURT: Are you satisfied with the representation and services of your attorney? THE DEFENDANT: Yes.

THE COURT: Do you have any complaint regarding the matter in which your attorney has represented you? THE DEFENDANT: No.

THE COURT: Let the record show it is the express finding of the Court that the defendant's plea of guilty to count 1 of the indictment in case Number A-22303 is made knowingly and voluntarily and with understanding of the nature of the charge against him, with an understanding of the consequences of the plea of guilty and that the plea of guilty is accepted. Now, with respect to count 2 of the indictment in case number A-22303, based upon the stipulation of counsel as to the facts, I find that you are guilty of count 2, which is committing a felony while on bail, or on your own recognizance.

Do I hear a motion with respect to the indictment in A-22479? MR. HOWARD: Your Honor, at this time the [11] State would move to dismiss the indictment in A-22479 as to the defendant Michael Jerome Cassius and as to that defendant only.

THE COURT: Any objection? MR. HAWKINS: No objection.

THE COURT: The motion is granted and the indictment filed December 12, 1972, in Case Number A-22479 is dismissed as to the defendant Michael Jerome Cassius only.

Will January 15 be all right for judgment and sentence? MR. HAWKINS: Yes, Your Honor.

THE COURT: Very well. It is ordered that judgment and sentence be pronounced with respect to the indictment in case A-22203, I should say judgment and sentence be pronounced in the indictment in Case A-

22303 on January 15, 1973, at 9:00 o'clock a.m. in Division 8 of this Court, and the defendant is remanded to the custody of the Sheriff of Pima County pending pronouncement of judgment and sentence.

MR. HAWKINS: The one additional matter, if we may, Your Honor, if the Court would entertain a motion for reduction of bond in this particular charge to $1,000 from the two that has been set.

The defendant, even in that situation, [12] would only be able to—I think his mother might be able to make the bond by putting up the automobile, and otherwise tying up her one piece of property that she owns, and Mr. Cassius has several matters here in Tucson that he needs to get cleared up if possible before whatever disposition is made, and we ask that it be reduced to $1,000.

THE COURT: Any objection? MR. HOWARD: The State would object, Your Honor, for several reasons. Mr. Cassius has a prior criminal record, and in fact is on parole from the State of California. This indicates to us that Mr. Cassius has roots not only in this community, but in other communities, and due to his criminal record and due to the Arizona multiple charges, the State feels that Mr. Cassius is not a very good risk for release on bond. I think that the Court should take into consideration the setting of the amount of bond and properly take that into consideration under the statutes.

THE COURT: What was he convicted of in California? MR. HOWARD: Burglary.

THE COURT: Burglary in California.

[13] MR. HOWARD: Prior to arrest for robbery in California, I don't know any of the facts in that case.

THE COURT: I said convicted. Burglary conviction in California and parole charge of burglary in A-22479, and then when he was released in that case for that charge, he then committed another burglary which he has admitted in open Court.

I would say the motion to reduce is denied.

MR. HAWKINS: Your Honor, if I might add a couple of things. He is on probation from California. David Smith, with the State Pardon & Parole, is his

probation officer, speaks highly of Mr. Cassius, it is detailed in this record.

THE COURT: Fine. When Mr. Smith comes into Court and speaks highly under oath, I might reconsider my decision. At this time, the decision, and without prejudice to any other application you may wish to make at a later time. The Court stands at recess in these matters and the defendant is remanded to the custody of the Sheriff of Pima County to await judgment and sentence or bail, as the case may be.

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

[Caption Omitting in Printing]

January 22, 1973

REPORTER'S TRANSCRIPT

Filed April 9, 1973

APPEARANCES:

TOM LETNES, Deputy County Attorney, for the Plaintiff

JOHN HAWKINS, Esq., for the Defendant

ROBERT LONG, Chief Deputy Adult Probation Officer

The above-entitled matter came on for hearing before the Honorable Jack G. Marks, Judge of the above-entitled Court, on the 22nd day of January, 1973, and the following proceedings were had, to wit:

PROCEEDINGS

THE COURT: State of Arizona, plaintiff, [15] versus Michael J. Cassius, Defendant, A-22303.

Is the State ready? MR. LETNES: Yes, Your Honor.

THE COURT: Is the defendant ready? MR. HAWKINS: Yes, Your Honor.

THE COURT: Is there any legal cause to show why judgment should not be pronounced? MR. HAWKINS: No, sir, there is not.

THE COURT: Any statement you wish to make, on behalf of Mr. Cassius at this time? MR. HAWKINS: Yes. I would, Your Honor. I don't know if the Court is aware—the Court has a detailed pre-sentence report before it and I would ask the Court to consider, though

his prior record does not look favorable, I would ask the Court to consider the involvement and circumstances of which these activities arose.

The frequent absence of his father, the family situation where it was too little money and too many children. His mother tried to work and stretch welfare, what little she had, as far as it would go. I think it is possible we might all be driven to do things and we wouldn't otherwise, faced with hunger, et cetera.

His problem subsequently was aggravated by heroin and drugs and that didn't help things. I [16] would ask the Court to consider that Mike is now 21 years of age and is worth saving at this point, that his family could use him financially and because he is the oldest male living at home. He has three younger siblings who could benefit. He is employed as a welder and would be employed as such, and I would ask the Court to consider it.

If the Court feels at the present time it is necessary, and I know that the Court is very much aware of the facts that count 2 in this case mandate consecutive sentence, I would ask the Court to consider, because of the mandatory consecutive sentence, that perhaps the total sentence of the two ought to be whatever the Court feels is the optimum sentence to imprison Mike.

His activities in the past cannot be repeated. He will have to prove it from what he has learned here and he will have to if he has to, spend time in prison, he will have to prove it in that, and know he cannot repeat the activities of the past; and last of all, for whatever value it is worth, Your Honor, we would ask you to consider that Mr. Cassius spent Saturday afternoon cooperating with the police, taking them to various places, and clearing records on their part, we do not have the confirmation from the County [17] Attorney or the police, but I understand 12 to 15 different ones, and I would ask the Court to consider.

THE COURT: That was for Mr. Cassius' benefit as well, as I explained to him in Chambers on January 19, that it would give him protection from further prosecution if he aided the police to close their cases, and if it amounted to 12 or 15 cases, then he has gained considerably by doing that.

MR. HAWKINS: Yes, Your Honor. I am sure it was of mutual benefit, and he understands that, and I would ask the Court to consider all circumstances in consideration.

THE COURT: Mr. Cassius, do you have anything to say on your own behalf, and in particular what happened since I saw you last on January 19, 1973? THE DEFENDANT: No, Your Honor.

THE COURT: Will you tell me anything about what you did with the police in the meantime? THE DEFENDANT: Well, I took them to different places where I committed crimes and told them what happened, how I did it, what I did with the merchandise, and, you know.

THE COURT: How many cases did you clear [18] up? THE DEFENDANT: About 15.

THE COURT: And were they all limited to burglaries, larceny and sale of marijuana? THE DEFENDANT: All burglaries.

THE COURT: Well, as I told you at that time, that was for your benefit as well as the police. THE DEFENDANT: Yes.

THE COURT: And that I couldn't give any hope that it might change the recommendation to send you to prison, because you yourself know that you have been living off society by these burglaries and thefts and drug matters, and that the time has come where you have got to go to prison.

I am sure that at 21 years of age, that this isn't either going to make you or break you by going to prison, but you have had too good a time on the public. THE DEFENDANT: Yes, sir. I know.

THE COURT: I can give you a break from the recommendation, but I am going to send you to prison. Is there anything else to say? THE DEFENDANT: No, Your Honor.

THE COURT: Does the State have anything to say? [19] MR. LETNES: No, Your Honor.

We will depend on the probation officer's recommendation.

THE COURT: Thank you.

With respect to count 1 of the indictment filed November 14, 1972, the defendant being asked to show legal cause why judgment should not be pronounced at this time, and no sufficient cause being shown or appearing to the Court, thereupon the Court renders its judgment that whereas you, Michael J. Cassius, also known as Carl Jackson, having pled guilty in this Court to the charge of burglary in the first degree, it is found by the Court that you are guilty of said crime.

Therefore, it is ordered adjudged and decreed, and the judgment and sentence of the Court is that you, Michael J. Cassius, also known as Carl Jackson, be imprisoned in the State prison at Florence, Arizona, for a term of not less than one year and not more than two years to date from arrival at the Arizona—no. You have been in custody how long? THE DEFENDANT: About three months.

THE COURT: What date is it. Can somebody establish the date?

[20] To date from November 4, 1972. The defendant is remanded to the custody of the Sheriff of Pima County, Arizona, to be by him delivered into the custody of the proper officers of the said State prison.

It is further ordered that a certified copy of this judgment shall be sufficient warrant for said Sheriff to take, keep and safely deliver the said Michael J. Cassius, also known as Carl Jackson, into the custody of the proper officers of said State prison, and the sufficient warrant for the officers of said State prison to keep and imprison the said Michael J. Cassius, also known as Carl Jackson in accordance herewith.

Now, with respect to count 2 of the indictment filed November 14, 1972, the defendant being asked to show legal cause why judgment should not be pronounced and no sufficient cause being shown or appearing to the Court, thereupon the Court renders its judgment, that whereas you, Michael J. Cassius, also known as Carl Jackson, pled guilty in the Court of the charge of committing a felony while on bail or on own recognizance,—

MR. HAWKINS: Your Honor, may I correct the Court in that I believe it was submitted and [21] the Court found it.

THE COURT: You are correct. Let us start over on count 2.

The defendant being asked to show legal cause why judgment should not be pronounced at this time and no sufficient cause being shown or appearing to the Court, thereupon the Court renders its judgment that whereas you, Michael J. Cassius, also known as Carl Jackson, having been found guilty in this Court of the charge of committing a felony while released upon your own recognizance, it is found by the Court that you are guilty of said crime.

Therefore, it is ordered, adjudged and decreed, and the judgment and sentence of the Court is that you, Michael J. Cassius, also known as Carl Jackson, be punished by imprisonment in the State prison, at Florence, Arizona, for a term of not less than one year and not more than three years to date from the completion of the sentence with respect to count 1 of this indictment entered earlier this date, and the defendant is remanded to the custody of the Sheriff of Pima County, Arizona, to be by him delivered into the custody of the proper officers of the said State prison, and it is further ordered [22] that a certified copy of this judgment shall be a sufficient warrant for the said Sheriff to take, keep and safely deliver the said Michael J. Cassius, also known as Carl Jackson, into the custody of the proper officers of said State prison, and a sufficient warrant for the officers of the said State prison to keep and imprison the said Michael J. Cassius, also known as Carl Jackson in accordance herewith.

Now, it is my duty to advise you in open Court, as I am, that you have a right to appeal from each judgment and sentence. That you have to file notice of appeal within 60 days, that you have a right to have counsel prosecute the appeal, and if indigent, the right to appointed counsel, the right to be furnished without cost a copy of the record and reporter's transcript for appeal purposes.

Now, Mr. Cassius, I want you to know that the sentence I have given you was less than the recommended sentence, and I took into consideration your clearing the cases for the police.

THE DEFENDANT: Thank you.

THE COURT: I want you to know you are the chief beneficiary for what you did Saturday, [23] and I am pleased you did it.

The Defendant is remanded to the custody of the Sheriff.

The Court stands at recess.

MR. HAWKINS: Thank you, Your Honor.

THE DEFENDANT: Thank you.

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

[Caption Omitted in Printing]

JUDGMENT AND COMMITMENT

Filed January 22, 1973

Convicted of: Committing Felony while on bail or own recognizance, a felony (Count II)

On this 22nd day of January, 1973, the defendant being present in open court, in person and by counsel, John Hawkins, and the deputy county attorney, Tom Letnes, being present on the part of the State, and this being the time heretofore fixed for passing judgment on the defendant, the defendant was informed by the Court of the nature of the Information filed charging the crime of Committing felony while on bail or own recognizance, a felony (Count II) committed on or about the 4th day of November, 1972; also of the arraignment and plea of not guilty as charged in the Indictment on the 16th day of November, 1972.

The defendant being asked to show legal cause why judgment should not be pronounced at this time, and no sufficient cause being shown or appearing to the Court, thereupon the Court renders its judgment, that, WHEREAS, you Michael J. Cassius, aka Carl Jackson, having been found guilty in this Court to the charge of Committing felony while on bail or own recognizance, a felony (Count II) it is found by the Court that you are guilty of said crime. Therefore,

IT IS ORDERED, ADJUDGED AND DECREED, and the judgment and sentence of the Court is that you Michael J. Cassius, aka Carl Jackson be punished by imprisonment in the State Prison at Florence, Arizona, for a term of not less than one (1) years, and not more than three (3) years, to date from the completion of

the sentence with respect to Count I of the Indictment entered earlier this date and defendant is remanded to the custody of the Sheriff of Pima County, Arizona, to be by him delivered into the custody of the proper officers of said State Prison.

IT IS FURTHER ORDERED that a certified copy of this Judgment shall be a sufficient warrant for said Sheriff to take, keep and safely deliver the said Michael J. Cassius, aka Carl Jackson into the custody of the proper officers of said State Prison, and a sufficient warrant for the officers of said State Prison to keep and imprison the said Michael J. Cassius, aka Carl Jackson in accordance herewith.

Thereupon, the defendant, in open court, was advised by the Court of the right to appeal, of the time in which notice of appeal may be filed and of the right to have counsel to prosecute the appeal, and, if indigent, of the right to appointed counsel and the right to be furnished, without cost, a copy of the record and reporter's transcript for appeal purposes.

/s/ Jack G. Marks
Judge

Copy received at 12 Noon
this 22 day of Jan., 1973

/s/ [Illegible]
Deputy Sheriff
18-1
(Prison)

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

[Caption Omitted in Printing]

JUDGMENT AND COMMITMENT

Filed January 22, 1973

Plea of Guilty to: Burglary, First Degree, a felony
(Count I)

On this 22nd day of January, 1973, the defendant being present in open court, in person and by counsel, John Hawkins, and the deputy county attorney, Tom Letnes, being present on the part of the State, and this being the time heretofore fixed for passing judgment on the defendant, the defendant, was informed by the Court of the nature of the Information filed charging the crime of Burglary, First Degree, a felony (Count I) committed on or about the 4th day of November, 1972; also of the arraignment and plea of Guilty as charged in the Indictment on the 4th day of January, 1973.

The defendant being asked to show legal cause why judgment should not be pronounced at this time, and no sufficient cause being shown or appearing to the Court, thereupon the Court renders its judgment, that, WHEREAS, you Michael J. Cassius, aka Carl Jackson, having pled guilty in this Court to the charge of Burglary, First Degree, a felony (Count I) it is found by the Court that you are guilty of said crime. Therefore,

IT IS ORDERED, ADJUDGED AND DECREED, and the judgment and sentence of the Court is that you Michael J. Cassius, aka Carl Jackson be punished by imprisonment in the State Prison at Florence, Arizona, for a term of not less than one (1) years, and not more than two (2) years, to date from November 4, 1972. and defendant is remanded to the custody of the Sheriff of Pima County, Arizona, to be by him delivered into the custody of the proper officers of said State Prison.

IT IS FURTHER ORDERED that a certified copy of this Judgment shall be a sufficient warrant for said Sheriff to take, keep and safely deliver the said Michael J. Cassius, aka Carl Jackson into the custody of the proper officers of said State Prison, and a sufficient warrant for the officers of said State Prison to keep and imprison the said Michael J. Cassius, aka Carl Jackson in accordance herewith.

Thereupon, the defendant, in open court, was advised by the Court of the right to appeal, of the time in which notice of appeal may be filed and of the right to have counsel to prosecute the appeal, and, if indigent, of the right to appointed counsel and the right to be furnished, without cost, a copy of the record and reporter's transcript for appeal purposes.

/s/ Jack G. Marks
Judge

[Sheriff's Acknowledgement of Receipt
Omitted in Printing]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

No. 2 CA-CR 331

THE STATE OF ARIZONA, APPELLEE

v.

MICHAEL J. CASSIUS aka CARL JACKSON, APPELLANT

Appeal from the Superior Court of Pima County
Cause No. A-22303

Honorable Jack G. Marks, Judge

REVERSED

OPINION—Filed Nov. 8, 1973

Gary K. Nelson, The Attorney General, Phoenix, by Howard L. Fell, Assistant Attorney General, Tucson, and Frank Leto, Certified Third-Year Law Student under Rule 28(e)

Attorneys for Appellee

Ed Bolding, Pima County Public Defender, Tucson, by Richard Van Duizend, Assistant Public Defender and Jeffrey W. Hanes, Certified Third-Year Law Student under Rule 28(e)

Attorneys for Appellant

KRUCKER, Judge.

This is an appeal from a judgment of conviction and sentences on one count of burglary, first degree, A.R.S. § 13-302, and one count of committing a felony while released on bail or on own recognizance on a separate felony charge, A.R.S. § 13-1580.

The peculiar facts of this case are: On October 17, 1972, appellant, Michael Jerome Cassius, was arrested

and charged with burglary, Cause No. A-22479. The following day, he was released on his own recognizance.

On November 4, 1972, while released on his own recognizance on the first burglary charge, appellant was again arrested for burglary and was charged in Cause No. A-22303 on two counts: Count I, violation of A.R.S. § 13-302 (burglary, first degree) and Count II, violation of A.R.S. § 13-1580 (committing a felony while released on bail or on own recognizance on a separate felony charge).

Proceedings were held on both burglary charges on January 4, 1973. At that time, Cause No. A-22479 was dismissed upon motion of the County Attorney. In Cause No. A-22303, appellant plead guilty to Count I, burglary, and Count II was submitted to the court on the basis of the Grand Jury transcript and stipulation of counsel that at the time of the second burglary appellant was released on his own recognizance in Cause No. A-22479. The court accepted appellant's guilty plea on Count I and found him guilty on Count II.

On January 22, 1973, appellant was sentenced to imprisonment for one and not more than two years on Count I and a consecutive term of not less than one or more than three years was imposed for the Count II conviction. This appeal followed.

Appellant submits two questions for review:

1. Whether appellant's conviction for violation of A.R.S. § 13-1580 (committing a felony while released on bail or on own recognizance) constituted double jeopardy under the Fifth Amendment of the United States Constitution and Art. 2 § 10 of the Arizona Constitution?
2. Whether the sentence imposed pursuant to A.R.S. § 13-1580 violated the statutory proscription of A.R.S. § 13-1641 against double punishment for the same offense?

Before we dispose of the issues raised by appellant, we first consider the State's contention that the issues of double jeopardy and double punishment were not raised below, therefore, are not preserved for appeal. In re-

sponse to this contention, appellant asserts that the issues are preserved by stipulation of counsel. He also argues that double jeopardy and double punishment affect substantial rights requiring this court on its own initiative to notice the defects. We agree with appellee that the double jeopardy issue is not preserved for appeal. However, we find the issue of double punishment properly submitted for review.

Generally, in Arizona the issue of double jeopardy may not be raised for the first time on appeal. State v. Veres, 7 Ariz.App. 117, 436 P.2d 629 (1968), cert. den. 393 U.S. 1014. The purported stipulation relied on by appellant is the following statement of the prosecutor:

> "MR. HOWARD: The charge in count 2 is committing a felony while released on his own recognizance on another felony charge, Your Honor, and the public defender would like to reserve their right to examine that Statute on appeal, so are reluctant to enter a plea at this point, and would prefer to submit it to the Court on the stipulated facts in the Grand Jury transcript, and there are certain matters which I will ask the Court to take judicial notice of from the Court file."

We find this insufficient to preserve the double jeopardy issue for review.

Appellant also asserts that he had no opportunity to raise this issue at the trial court level. We find no merit in this argument. Appellant, after having been found guilty on Count I, made no attempt to utilize Rule 177, Rules of Criminal Procedure, 17 A.R.S.[1] as to Count II on the grounds of prior conviction or double jeopardy. Appellant's failure to raise the issue of double jeopardy below precludes appellate consideration of such issue.

As to the issue of double punishment, however, it may be raised for the firse time on appeal. State v. Mills, 96 Ariz. 377, 396 P.2d 5 (1964). We therefore turn our attention to appellant's contention that the sentences im-

[1] This case is decided on the law as it existed prior to September 1, 1973.

posed on Count I and Count II constituted double punishment in violation of A.R.S. § 13-1641, which provides:

> "An act or omission which is made punishable in different ways by different sections of the laws may be punished under either, but in no event under more than one. An acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other."

Prior to the Supreme Court decisions in State v. Mitchell, 106 Ariz. 492, 478 P.2d 517 (1970), and State v. Tinghitella, 108 Ariz. 1, 491 P.2d 834 (1971), there appeared to be some confusion in applying A.R.S. § 13-1641. However, as formulated in *Mitchell*, supra, and adopted in *Tinghitella*, supra, an "identical elements" test is the standard, requiring elimination of the elements in one charge and a determination of whether the facts left support the other charge. *See also*, State v. Horton, 108 Ariz. 16, 492 P.2d 395 (1972); State v. George, 108 Ariz. 5, 491 P.2d 838 (1971); and State v. Bartky, 16 Ariz. App. 421, 493 P.2d 1226 (1972).

In spite of the seeming simplicity of this statute and the test, judicial interpretation and application to a given set of facts has proven to be a complex task. This case is no exception.

Our review of the myriad of cases dealing with the application of A.R.S. § 13-1641 sheds no light on the problem *sub judice*. We find no case with a factual posture remotely similar to this case. However, there is one common denominator—the purpose of the subject statute is to protect an offender against double punishment for a *single act* which violates more than one statute. *See*, *Mitchell*, supra; State v. Andrews, 106 Ariz. 372, 476 P.2d 673 (1970); State v. Ballez, 102 Ariz. 174, 427 P.2d 125 (1967); and State v. Hutton, 87 Ariz. 176, 349 P.2d 187 (1960).

As previously noted, appellant, in Cause No. A-22303, was found guilty and sentenced on two counts: Count I, violation of A.R.S. § 13-302, and Count II, violation of A.R.S. § 13-1580. The pertinent provisions of these statutes are:

"§ 13-302. Definition and degrees of burglary; punishment

A. A person entering a building, dwelling house office, room, apartment, tenement, shop, warehouse, store . . . with intent to commit grand or petty theft, or any felony . . . is guilty of burglary.

B. Burglary committed in the nighttime is burglary of the first degree, punishable by imprisonment in the state prison for not less than one or more than fifteen years."

"§ 13-1580. Committing felony while on bail on felony charge: penalty

A person who is convicted of committing any felony offense, whether federal or state, which felony offense is committed while such person is released on bail or his own recognizance on a separate felony charge is guilty of the offense of committing a felony while released on bail or his own recognizance and upon conviction of such crime shall be punished by imprisonment in the state prison for not more than five years. Such penalty shall be in addition to and shall be served consecutively to any penalty imposed for the offense committed while released on bail or on his own recognizance."

The elements necessary to prove burglary, first degree, are: (1) an entry, (2) with intent to commit a felony, and (3) commission in the nighttime. A violation of A.R.S. § 13-1580 requires (1) a conviction of committing any felony, (2) which is committed while a person is released on bail or his own recognizance on a separate felony charge.

Appellant's only *act* was the burglary of November 4, 1972, which was committed while he was released on his own recognizance on a separate felony charge. For this *single act*, he has been convicted and sentenced for two felony offenses. If one or all of the elements of burglary are eliminated, what facts are left to support the charge under A.R.S. § 13-1580? There are none. We find no other *act* by appellant, hence no support for a charge under A.R.S. § 13-1580. The factual basis for conviction

under either statute is the same *act* on the part of appellant.

The State, however, argues that the elements of A.R.S. § 13-1580 are different, i.e., (1) conviction of a felony and (2) such felony having been committed during a designated period. We find such argument specious. The "conviction" element is a *judicial act*, not appellant's, leaving only the burglary as the act of appellant. To adopt the State's construction would defeat the very purpose of A.R.S. § 13-1641 and allow the prosecution to accomplish indirectly that which cannot be done directly.

Application of the "identical elements" test enunciated by our Supreme Court would mandate the conclusion that the statutory proscription of A.R.S. § 13-1641 has been violated. However, to so hold would render A.R.S. § 13-1580 completely inoperative. We must presume that the legislature did not intend to do a futile act in enacting A.R.S. § 13-1580. Campbell v. Superior Court, 105 Ariz. 252, 462 P.2d 801 (1969). We also assume that the legislature was aware of the existence of A.R.S. § 13-1641 and therefore that A.R.S. §§ 13-1641 and 13-1580 were intended to operate as a compatible whole. *See*, Arizona State Board of Directors v. Phoenix Union High School District, 102 Ariz. 69, 424 P.2d 819 (1967). It must, therefore, have been the intention of the legislature to except from A.R.S. § 13-1641 the later-enacted A.R.S. § 13-1580. However, whether or not such exception was intended, we are of the opinion that A.R.S. § 13-1580 is violative of the equal protection clause of the 14th Amendment to the United States Constitution.

Initially we note that appellant did not attack the constitutionality of A.R.S. § 13-1580 in the trial court. Generally, constitutional questions must first be presented to the trial court for determination. Porter v. Eyer, 80 Ariz. 169, 294 P.2d 661 (1956). However, fundamental error is such error as goes to the foundation of the case, or which takes from a defendant a right essential to his defense, State v. Pulliam, 87 Ariz. 216, 349 P.2d 781 (1960), and we must search the record for such error in all criminal appeals. State v.

Powell, 5 Ariz.App. 51, 423 P.2d 127 (1967). Furthermore, this court on its own initiative should notice defects which affect substantial rights, principally those affecting constitutional rights, solely to prevent a miscarriage of justice. State v. Gilreath, 107 Ariz. 318, 487 P.2d 385 (1971).

As stated in State v. Pugh, 31 Ariz. 317, 252 P. 1018 (1927):

> "But where for any constitutional reason the law under which a party is being prosecuted is void, the question need not be formally raised, as when that fact is discovered by the court, even on appeal, it will be considered." 31 Ariz. at 319.

Therefore, in accordance with our absolute duty to protect constitutional rights, Marquez v. Rapid Harvest Co., 1 Ariz.App. 562, 405 P.2d 814 (1965), and to prevent a miscarriage of justice, we raise the constitutionality of A.R.S. § 13-1580 *ex mero motu*.

Since this case involves a crime relating to bail and the release of one on his own recognizance, it is important to understand the nature and purpose of bail. In Arizona, bail is a constitutionally protected right. Art. 2 § 22 of the Arizona Constitution provides:

> "All persons charged with crime shall be bailable by sufficient sureties, except for:
>
> 1. Capital offenses when the proof is evident or the presumption great.
> 2. Felony offenses, committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge."

Although bail is conditioned upon the giving of "sufficient sureties," Rendel v. Mummert, 106 Ariz. 233, 474 P.2d 824 (1970), it is nonetheless a constitutionally protected right. As stated in Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951):

> "This traditional right to freedom before conviction permits the unhampered preparation of a defense,

> and serves to prevent the infliction of punishment prior to conviction. [Citations omitted] Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." 72 S.Ct. at 3.

Bail is exacted for the *sole* purpose of securing attendance of the defendant in court at all times when his presence may be lawfully required, and his surrendering himself in execution of any lawful judgment that may be pronounced against him. Gusick v. Boies, 72 Ariz. 309, 234 P.2d 430 (1951). When setting bail, the judge should take into account the defendant's prior arrests and convictions, his record of appearances at court proceedings, his record of flight to avoid prosecution, and his failure to appear at court proceedings. Rendel v. Mummert, supra. It is assumed that the threat of forfeiture of one's goods will be an effective deterrent to the temptation to breach the conditions of one's release. Brandy v. United States, —— U.S. ——, 81 S.Ct. 197, —— L.Ed.2d —— (1960).

With this background, we turn to the constitutionality of A.R.S. § 13-1580. The basic principles governing application of the equal protection clause of the Fourteenth Amendment are familiar. As the Chief Justice recently explained in Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971):

> "In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. Barbier v. Connolly, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 (1885); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911); Railway Express Agency v. New York, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949); McDonald v. Board of Election Commissioners, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into differ-

> ent classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920)." 92 S.Ct. at 253, 254.

A.R.S. § 13-1580 creates two classes of accused persons and treats them differently. Thus the question is whether different treatment of those on bail or their own recognizance as opposed to those remaining in jail bears a rational relationship to the objectives apparently sought to be advanced by the operation of A.R.S. § 13-1580.

This statute was not adopted from any other jurisdiction, and we know of no other jurisdiction with a similar one. Although there is no legislative history to shed light on the legislative intent, and we have not had the benefit of appellate argument thereon, it is evident that A.R.S. § 13-1580 has a two-fold objective: (1) deterrence of criminal activity on the part of individuals who have been released on bail or on their own recognizance, and (2) enhancement of punishment of those who engaged in criminal activity while so released. These objectives are clearly rational and reasonable. However, the operation of this statute transcends those objectives.

When the legislature enacted A.R.S. § 13-1580, it created a separate criminal offense—the offense of committing a felony while released on bail or own recognizance. By statute, a class of individuals who have exercised their state constitutional right to bail has been singled out. As to these individuals, the legislature has declared it to be a crime to be convicted of a crime. On the other hand, had they failed to exercise their constitutional right and remained in jail, there can be no such crime.

A simple illustration will demonstrate how this statute operates. For example, A and B are both arrested and charged with burglary. A is released on bail and B remains in jail. While released, A commits aggravated battery on a police officer. While in jail, B also commits

aggravated battery on a police officer. Pursuant to a plea bargain, the original battery charges against both A and B are dropped in exchange for a plea of guilty to the battery charges. Notwithstanding the fact that A and B have committed identical crimes, A may be convicted of two crimes—(1) aggravated battery and (2) committing a felony while released on bail or own recognizance. However, B can only be convicted of aggravated battery because his crime was committed in jail. Taken one step further, assume that A had been mistakenly accused and was totally innocent of the burglary charge. Under A.R.S. § 13-1580 he may still be convicted of two criminal offenses for the single battery solely because the act was committed while on bail. We fail to see any rational relationship between the objectives of A.R.S. § 13-1580 and its operation.

The Supreme Court of California in the case of In re King, 3 Cal.3d 226, 90 Cal.Rptr. 15, 474 P.2d 983 (1970), held unconstitutional a California statute which prescribed varying penalties between two categories of non-supporting fathers—(1) those who remain out of state for 30 days and (2) those who do not. Under the statute, any father who remained out of the State of California for 30 days while not supporting his child was guilty of a felony and a father who committed the identical act of criminal nonfeasance, but happened to be within California, was guilty only of a misdemeanor. The court found this provision a denial of equal protection of the laws because it created additional criminal liability on an individual solely because he chose to remain outside the state. The court pointed out that:

> "'If a law has 'no other purpose * * * than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' United States v. Jackson, 390 U.S. 570, 581, 88 S.Ct. 1209, 1216, 20 L.Ed.2d 138 (1968).'" 90 Cal.Rptr. at 21, 22

Similarly, in Spillers v. State, 84 Nev. 23, 436 P.2d 18 (1968), the Supreme Court of Nevada held unconstitutional a statute which provided that a person con-

victed of rape could not be sentenced to death if the case were tried to the court, but death could be imposed if affixed by a jury verdict. The court stated:

> "A State may not prescribe different penalties for the same offense without violating the equal protection concept. Thus the statute is unconstitutional insofar as it allows a jury to impose a greater penalty than a court for the same offense, thus violating the Sixth and Fourteenth Amendments to the federal constitution, and art. 1, § 3 of our state constitution." 436 P.2d at 23.

Although *King* and *Spillers* were not concerned with a state constitutional right to bail, they denounced exactly that which our statute attempts—(1) the prescribing of different penalties for the same offense and (2) penalizing one for exercising a constitutional right. A.R.S. § 13-1580 not only prescribes different penalties for the same offense, but also creates an additional crime for the same offense, which crime can only be committed after one has exercised his constitutional right to bail.

As noted earlier, the sole purpose of bail is to secure the attendance of a defendant at trial. Making it an offense to be convicted of a felony which was committed while on bail neither helps secure the attendance of a defendant at trial nor insures compliance with the legal processes of this State. It serves no other purpose than to make bail an instrument of oppression which our Supreme Court has denounced. *Gusick*, supra. Our legislature has effectively chilled the assertion of the constitutional right to bail by penalizing those who have chosen to exercise it.

Regardless of the character of the crime, an accused on bail is clothed with the presumption of innocence. *Gusick*, supra. By singling out those admitted to bail, A.R.S. § 13-1580 strips the innocent of that presumption. One accused of a crime is not *ipso facto* a menace to society as A.R.S. § 13-1580 seems to presume. Such a presumption erodes the very foundation of our system of criminal justice, namely, the presumption of innocence.

If one is in fact a menace to society, adequate protective devices already exist. Art. 2 § 22 of our Constitution is itself designed to protect society from the dangerous. Paragraph 2 of that section denies bail, under designated circumstances, to a person who commits a felony while admitted to bail. A court may in its discretion set a higher bail for a defendant having recidivist tendencies. Release from custody is conditioned on good behavior while so released, A.R.S. § 13-1577(D), and upon a breach of such condition, bail may be revoked. A.R.S. § 13-1578; *Rendel*, supra.

To achieve the objectives of A.R.S. § 13-1580, there is a reasonable way available with a lesser burden on the constitutionally protected right to bail. As was done in the District of Columbia [2] the legislature could enact a law enhancing the punishment of those who commit a felony while released on bail or own recognizance. Unlike our statute, in the District of Columbia it is not a *crime* to commit a crime while released on bail.

Although we need not decide the question of inverse discrimination, it should be noted that in Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970), it was recognized that if a wrongdoer were insulated from punishment because of indigency, equal

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[2] D.C. Code Ann., § 23-1328 (1971), provides:

"Penalties for offenses committed during release

(a) Any person convicted of an offense committed while released pursuant to section 23-1321 shall be subject to the following penalties in addition to any other applicable penalties:

(1) A term of imprisonment of not less than one year and not more than five years if convicted of committing a felony while so released; and

(2) A term of imprisonment of not less than ninety days and not more than one year if convicted of committing a misdemeanor while so released.

(b) The giving of a warning to the person when released of the penalties imposed by this section shall not be a prerequisite to the application of this section.

(c) Any term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment."

protection would be denied the offender who is punished. The Supreme Court stated:

> "The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to an inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction." 90 S.Ct. at 2024.

Under A.R.S. § 13-1580, one on bail or own recognizance is punished twice for one act, whereas the person who cannot afford bail is insulated from such double punishment even though he committed the identical act. The indigent who cannot afford bail is subject to a single charge.

We agree that the legislative objective in enacting A.R.S. § 13-1580 is commendable, but it is unfortunate that, as written, it cannot withstand constitutional scrutiny. We therefore hold that A.R.S. § 13-1580 is unconstitutional and appellant's conviction on Count II cannot stand. The judgment of conviction and sentence imposed thereon are ordered vacated.

HERBERT F. KRUCKER
Judge

CONCURRING:

JAMES D. HATHAWAY
Chief Judge

LAWRENCE HOWARD
Judge

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

No. 2 CA-CR 331

THE STATE OF ARIZONA, APPELLEE,

v.

MICHAEL J. CASSIUS, AKA CARL JACKSON, APPELLANT.

PIMA County
Superior Court
Cause No. A-22303

Filed Dec. 11, 1973

ORDER

IT IS ORDERED that the Motion for Rehearing be, and the same hereby is, denied.

Dated: December 11, 1973.

/s/ James D. Hathaway
Chief Judge

/s/ Lawrence Howard
Judge

/s/ Herbert F. Krucker
Judge

SUPREME COURT
STATE OF ARIZONA

No. 2867-PR

January 23, 1974

THE STATE OF ARIZONA, APPELLEE,

v.

MICHAEL J. CASSIUS, AKA CARL JACKSON, APPELLANT.

CORRECTED COPY

The following action was taken by the Supreme Court of the State of Arizona on January 22, 1974 in regard to the above-entitled cause:

"ORDERED: Petition for Review—Granted."
The Supreme Court has adequate sets of briefs. Therefore, no additional briefs will be necessary.

Clifford H. Ward
Clerk

By /s/ Mary Ann Hopkins
Deputy Clerk

SUPREME COURT
STATE OF ARIZONA

Supreme Court No. 2867-PR

[Caption Omitted in Printing]

The following action was taken by the Supreme Court of the State of Arizona on February 19, 1974 in regard to the above-entitled cause.

"ORDERED: Request for Oral Argument—Denied.

FURTHER ORDERED: Motion for Leave to Submit Authorities—Granted.

FURTHER ORDERED: Defendant granted 30 days in which to submit said authorities."

Clifford H. Ward
Clerk

By /s/ Mary Ann Hopkins
Deputy Clerk

IN THE SUPREME COURT OF THE
STATE OF ARIZONA
En Banc

No. 2867-PR

THE STATE OF ARIZONA, APPELLEE,

v.

MICHAEL J. CASSIUS, AKA CARL JACKSON, APPELLANT.

Appeal from the Superior Court of Pima County
Honorable Jack Marks, Judge
(Cause No. A-22303)

JUDGMENT AND SENTENCE AFFIRMED

Opinion of the Court of Appeals, Division Two, 21 Ariz. App. 78, 515 P.2d 903 (1973) Vacated Filed April 16, 1974

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By Howard L. Fell
Assistant Attorney General — Tucson

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Third Year Law Student — Tucson

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Attorneys for Appellant

HAYS, Chief Justice

The defendant, Michael J. Cassius, also known as Carl Jackson, appealed from a judgment finding him guilty of having committed a felony while free on his own recognizance, in violation of A.R.S. § 13-1580. The Court of Appeals reversed the trial court in State v. Cassius aka Jackson, 21 Ariz. App. 78, 515 P.2d 903 (1973). We granted the state's petition for review. We vacate the opinion of the Court of Appeals and affirm the judgment and sentence of the Superior Court.

Defendant, while free on his own recognizance on a burglary charge, was caught burglarizing a building less than three weeks after his release. Because of the second burglary, he was indicted on two counts: (1) first degree burglary, and (2) committing a felony while free on his own recognizance. As a result of a plea bargain, he pleaded guilty to the first count—the second burglary—and agreed to be tried on the second count with the evidence limited to the grand jury minutes and the stipulation that he was free on his own recognizance at the time of the second arrest. In return, the state dismissed the charges based on the first burglary. The trial judge sentenced him to one to two years in prison for the burglary, and imposed a consecutive sentence of one to three years after finding him guilty on Count 2.

On appeal, defendant raised two questions: (1) whether the second count was a violation of the double jeopardy clause of the state and federal constitutions, and (2) whether the second count was a violation of A.R.S. § 13-1641, which provides that a conviction and sentence for a criminal act bars a subsequent prosecution for the same act.

The Fifth Amendment to the United States Constitution provides that no person shall be twice put in jeopardy *for the same offense.* This prohibition is binding upon the states. Benton v. Maryland, 395 U.S. 784, 89 S. Ct.

2056, 23 L. Ed. 2d 707 (1969). The Arizona Constitution, Art. 2 § 10, contains substantially the same language.

The fallacy of defendant's argument on the issue of double jeopardy is that we are not, in the instant case, dealing with *the same offense*. The first count charged him with burglary. The second count charged him with being convicted of a felony while free on his own recognizance. These offenses are entirely different.

The question of whether two offenses are the same, and the criteria for resolving that question, are set out in State v. Tinghitella, 108 Ariz. 1, 491 P.2d 834 (1971). There, we held that in order to constitute different offenses, no element of either offense may be an element of the other; *i.e.*, the two offenses must not contain a common element. It is quite obvious that the two offenses with which defendant was charged have no common element.

The federal courts use a different test, less favorable to the defendant. They hold that the offenses charged are not the same if each contains an element not contained in the other. Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). It is, therefore, perfectly clear that double jeopardy is not a viable defense in this case. These matters are analyzed in 14 Arizona Law Review 513.

Defendant's second point is that the conviction and sentence under A.R.S. § 13-1580 violates A.R.S. § 13-1641 which reads:

> "An act or omission which is made punishable by different sections of the laws may be punished under either, but in no event under more than one. An acquittal, or conviction and sentence under either one bars a prosecution for the same act or omission under any other."

The material part of A.R.S. § 13-1580 reads:

> "A person who is convicted of committing any felony offense . . . which felony offense is committed while such person is released on his own recognizance on a separate felony charge, is guilty of the offense of committing a felony while released on . . . his own recognizance, and upon conviction . . . shall be punished by imprisonment . . . for not more than five years."

It is, of course, obvious that these two sections can be read as contradictory unless some sort of statutory construction is applied to them, since a person who commits a felony while free on his own recognizance, may be guilty of two felonies under § 13-1580.

We will not assume that the legislature, in enacting a statute, was unaware of an existing statute. Arizona State Board of Directors v. Phoenix Union High School Dist., 102 Ariz. 69, 424 P.2d 819 (1967). Where statutes in *pari materia* are in apparent conflict, they should be construed in harmony so as to give force and effect to each. State Land Dept. v. Tucson Rock & Sand Co., 107 Ariz. 74, 481 P.2d 867 (1971). Where a later statute does not expressly repeal a former one, they should be construed so as to give effect to each, if possible. State v. Jaastad, 43 Ariz. 458, 32 P.2d 799 (1934). When dealing with separate statutes, the court must construe them so as to give meaning to both, if possible. Finch v. State Department of Public Welfare, 80 Ariz. 226, 295 P.2d 846 (1956). The presumption is that the legislature did not intend to do a futile thing by including in a statute a provision which is nonoperative or invalid. Kelly v. Bastedo, 70 Ariz. 371, 220 P.2d 1069 (1950). Where a statute first expresses a general intent, and later an inconsistent particular intent, such particular intent will be taken as an exception to the general intent, and both will stand. Sakrison v. Pierce, 66 Ariz. 162, 185 P.2d 528 (1947).

We believe the application of these rules should and does lead us to the conclusion that the legislature intended to engraft § 13-1580 onto § 13-1641 as an exception so that the two statutes should be read to mean that for one act there may be only one prosecution except when it is committed while the accused is out of jail on his own recognizance. Read in this way, neither quoted section conflicts with the other, and each is given full effect. We therefore hold that the position taken by defendant in his second point is untenable.

Ordinarily, covering all of the points made by defendant in his appeal brief disposes of the appeal and points the way to the final disposition, unless a search of the record discloses some fundamental error not raised by defendant. We have examined the record for fundamental error and find none. However, we note that the Court of Appeals also examined the record for fundamental error and found that it existed in the form of a violation of the equal protection clause of the state and federal constitutions. The court's holding is based on the argument that A.R.S. § 13-1580 creates two classes of persons and treats them differently. The court felt that the class which has exercised its constitutional right to bail has been singled out by making it a crime for a member of that class to be convicted of a crime, while the class which has not exercised the right to bail is not so restricted. We completely disagree with this reasoning.

While it is true that the right to bail has a constitutional basis, it has always been recognized that limitations may be imposed upon it. Generally, bail is granted on condition that the defendant stay within the court's jurisdiction and that he conduct himself as a law-abiding citizen. Rule 7.3 of the new Rules of Criminal Procedure, 17 A.R.S., makes this last requirement mandatory. There has never been any doubt that these are legitimate conditions. The Court of Appeals felt that our statute has the effect of chilling the assertion of the constitutional right to bail by penalizing those who choose to exercise that right. But merely requiring that a man abide by the law is not a chilling limitation; it is a requirement that he is obligated to follow whether or not on bail, and it existed even before bail was granted.

The opinion of the Court of Appeals recognizes that it would be constitutional to *increase the punishment* for a crime committed while out on bail! We fail to see the distinction. As a matter of fact, we have a recidivist statute, enhancing the punishment of defendants who have prior convictions, and it has never been held to be a violation of the equal protection clauses. In State v. Sanchez, 110 Ariz. 214, 516 P.2d 1226 (1973), we cited

the following language of the United States Supreme Court:

> "The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is done without any reasonable basis, and therefore is purely arbitrary." 516 P.2d at 1229.
>
> • • • •
>
> "When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted, must be assumed." 516 P.2d at 1229.
>
> • • • •
>
> "One who assails the classification in such a law must carry the burden of showing that it does not rest on any reasonable basis, but is essentially arbitrary. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S. Ct. 337, 340, 55 L. Ed. 369 (1911)." 516 P.2d at 1229.

It is true that, as the Court of Appeals points out, it is unconstitutional to legislate that different treatment be accorded to persons placed by statute into different classes, on the basis of criteria wholly unrelated to the objective of that statute. We see no application of that rule to this case.

The opinion of the Court of Appeals is vacated, and the judgment and sentence of the Superior Court are affirmed.

JACK D. H. HAYS
Chief Justice

CONCURRING:

JAMES DUKE CAMERON
Vice Chief Justice

FRED C. STRUCKMEYER, JR.
Justice

LORNA E. LOCKWOOD
Justice

WILLIAM A. HOLOHAN
Justice

SUPREME COURT
STATE OF ARIZONA
Phoenix 85007

May 22, 1974

Supreme Court No. 2867-PR
Pima County No. A-22303

STATE OF ARIZONA, APPELLEE,

v.

MICHAEL J. CASSIUS AKA CARL JACKSON, APPELLANT.

The following action was taken by the Supreme Court of the State of Arizona on May 21, 1974 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing—Denied."

Copy of Order Affirming Judgment and Sentence enclosed herewith.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-5140

MICHAEL J. CASSIUS, PETITIONER,

v.

ARIZONA

On petition for writ of Certiorari to the Supreme Court of the State of Arizona.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 15, 1974

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WJS:JPT:cl
9-5-74
CR6-128

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-5149

MICHAEL J. CASSIUS,
Appellant-Petitioner,

-vs-

STATE OF ARIZONA,
Appellee-Respondent.

ORIGINAL COPY

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI

W. WARNER LEE
The Attorney General of
the State of Arizona

WILLIAM J. SCHAFER III
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Attorneys for APPELLEE-
RESPONDENT

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JURISDICTION

Respondent, for the purposes of this response, accepts petitioner's statement of these issues.

QUESTIONS PRESENTED

I. WHEN BOTH OFFENSES AROSE OUT OF THE SAME TRANSACTION, MAY PETITIONER BE PUNISHED BOTH FOR COMMITTING A BURGLARY [ARIZ.REV.STAT.ANN. § 13-302 (Cum.Supp. 1973)] AND FOR COMMITTING IT WHILE ON RELEASE PENDING ANOTHER CHARGE [ARIZ.REV. STAT.ANN. § 13-1580 (Cum.Supp. 1973)] WITHOUT VIOLATING THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BECAUSE THE ELEMENTS OF THE TWO OFFENSES ARE DIFFERENT?

II. DOES THE STATE OF ARIZONA HAVE A RATIONAL BASIS FOR ENACTING ARIZ.REV.STAT.ANN. § 13-1580 (Cum.Supp. 1973) AND MAKING IT A SEPARATE OFFENSE?

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

United States Constitution Amendment Five:

> " * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * * "

Ariz.Rev.Stat.Ann. § 13-1580 (Cum.Supp. 1973):

> "A person who is convicted of committing any felony offense, whether federal or state, which felony offense is committed while such person is released on bail or his own recognizance on a separate felony charge, is guilty of the offense of committing a felony while released on bail or his own recognizance and upon conviction of such crime shall be punished by imprisonment in the state prison for not more than five years. Such penalty shall be in addition to and shall be served consecutively to any penalty imposed for the offense committed while released on bail or on his own recognizance. Added Laws 1972, Ch. 126, § 1."

STATEMENT OF FACTS

On October 17, 1972, petitioner was arrested and charged with burglary. Although on parole from California, where he had been previously convicted of burglary, he was released on his own recognizance. (See R.T., at 12, January 4, 1973). This first offense was assigned Case Number A-22479.

While released on his own recognizance (OR release) on the first Arizona charge, on November 4, 1972, petitioner was arrested in the progress of committing a night time commercial burglary (R.T., at 7, January 4, 1973). Petitioner was charged with two counts: Count I, first degree burglary [Ariz.Rev.Stat. Ann. § 13-302 (Cum.Supp. 1973)], and Count II, committing a felony while on OR release pending another felony charge [Ariz. Rev.Stat.Ann. § 13-1580 (Cum.Supp. 1973)]. Both these offenses were assigned Case Number A-22303.

The prosecutor and public defender negotiated a plea agreement which was accepted by the court on January 4, 1973. In accordance with the plea agreement the first burglary charge was dismissed entirely (Case Number A-22479). In return the petitioner admitted and pled guilty to the second burglary offense in Count I of the second case (Case Number A-22303) and Count II, the offense of committing a felony while on OR release pending a separate felony charge, was submitted to the court on stipulated facts. The stipulated facts were: (1) The first charge, which was dismissed, had been a felony; (2) At the time petitioner committed the second burglary, he was on OR released pending trial for the first burglary; (3) The second offense, the burglary, was in fact a felony; and (4) Petitioner would plead guilty to the second offense (R.T., at 2-5, January 4, 1973). After accepting the guilty plea to the second burglary, the court based upon the stipulated facts found petitioner guilty of the second offense, committing a felony while on his own

recognizance (R.T., at 10, January 4, 1973).

Considering the fact that petitioner cooperated with the police and cleared 12-15 burglary cases for them, the court sentenced him to not less than one nor more than two years for the burglary offense and to a consecutive term of not less than one nor more than three years for the second offense of committing a felony while on OR release (R.T., at 16-18, January 23, 1973). Petitioner appealed from the judgment, but restricted his appeal to the conviction under Ariz.Rev.Stat.Ann. § 13-1580, committing a felony while on OR release. The Arizona Court of Appeals did not consider petitioner's allegation of Double Jeopardy. It held that the double jeopardy issue had not been preserved for appeal. State v. Cassius, 21 Ariz.App. 78, 515 P.2d 903, 905 (1973). However, sua sponte, the court raised the issue of equal protection, and then held that the statute violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. Id. 515 P.2d at 907.

The Arizona Supreme Court granted a Petition for Review by the State. The Court considered both the claim of double jeopardy and the claim of denial of equal protection.

The Court found both claims to be without merit and on April 16, 1974 vacated the Court of Appeals decision and affirmed petitioner's conviction. State v. Cassius, 110 Ariz. 485, 520 P.2d 1109 (1974). Petitioner's Motion for Rehearing was denied on May 21, 1974.

REASONS WHY THE WRIT SHOULD NOT ISSUE

I

PETITIONER'S CONVICTION FOR THE SECOND AND SEPARATE OFFENSE OF COMMITTING A FELONY WHILE ON OR RELEASE DID NOT SUBJECT HIM TO DOUBLE JEOPARDY.

Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d

707 (1969) held that the Double Jeopardy Clause of the Fifth Amendment was binding on the states under the Fourteenth Amendment to the United States Constitution.

The clause reads " * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * * " (emphasis supplied).

Normally the issue would then be: Was petitioner convicted of the same offense twice? For the double jeopardy clause is only applicable when a person is twice put in jeopardy for the same offense. Moore v. Missouri, 159 U.S. 673, 16 S.Ct. 179, 40 L.Ed. 301 (1895).

But here petitioner admits that Ariz.Rev.Stat.Ann. § 13-302 and § 13-1580 are separate offenses. "It is important to note that section 13-1580 creates a separate offense and does not merely provide for an augmentation of punishment." (Petition for Writ of Certiorari, at 5).

Petitioner then argues policy reasons why the State under its police powers should not be allowed to define this crime, e.g.: it permits the prosecutor full discretion in deciding to charge or not; that it presumes the person more culpable who commits a felony while on OR release than one who commits the same felony when not on OR release; that a court can order a person released on OR thus forcing him to be subjected to this offense, that somehow the offense violates the Bill of Attainder Clause of Article I, Section 10 of the United States Constitution, etc. (Petition for Writ of Certiorari, at 5-7.)

It is submitted that this is a blunderbust attempt by petitioner to justify an untenable position. And on these facts such an argument is both a blunder and a bust.

Since at least the turn of the century, the test for double jeopardy under the United States Constitution has remained pristine in application: "offenses for the purpose of double

jeopardy must be the same in law and in fact." United States v. Pacelli, 470 F.2d 67, 72 (2nd Cir., 1972). Apparently, this mirror element test was first announced by this Court in Carter v. McClaughry, 183 U.S. 367, 22 S.Ct. 181, 46 L.Ed. 236 (1902):

> "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."
>
> Id. 183 U.S. at 395 (emphasis supplied).

Accord, Callanan v. United States, 364 U.S. 587, 81 S.Ct. 321, 5 L.Ed.2d 312 (1961); Gore v. United States, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958); Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); and Gavieres v. United States, 220 U.S. 338, 342, 31 S.Ct. 421, 55 L.Ed. 489 (1911).

While it is true petitioner's single act was an offense against both Ariz.Rev.Stat.Ann. § 13-302 (Cum.Supp. 1973) and Ariz.Rev.Stat.Ann. § 13-1580 (Cum.Supp. 1973) these are not the same offenses in both law and fact. In order to have convicted the petitioner of both offenses, the state had to be prepared to prove:

Ariz.Rev.Stat.Ann. § 13-302 (Cum.Supp. 1973):

A. Petitioner entered unlawfully a building, dwelling, etc.

B. He entered with the intent to commit a grand or petty theft, or a felony.

C. To prove the first degree burglary, the state must further prove petitioner performed the burglary at night.

But to prove commission of a felony while on OR release,

the proof would have to reflect the type of facts stipulated to by the petitioner in this case (R.T., at 3-5, January 7, 1974).

Ariz.Rev.Stat.Ann. § 13-1580 (Cum.Supp. 1973):

> A. Petitioner had been charged with a felony and released on bail OR release.
>
> B. That while on release he committed a crime.
>
> C. That the crime was a felony, and
>
> D. That he was convicted of this second felony.

In reviewing this and rejecting petitioner's argument that these are not separate elements, the Arizona Supreme Court correctly stated:

> "The fallacy of defendant's argument on the issue of double jeopardy is that we are not, in the instant case, dealing with the same offense . . . These offenses are entirely different."
>
> * * *
>
> "It is quite obvious that the two offenses with which defendant was charged have no common element."

Cassius, supra, at 520 P.2d 1110, 1111 (emphasis added).

Cf. Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967); Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962); and Moore v. Missouri, supra.

II

THE STATE OF ARIZONA HAS A RATIONAL BASIS FOR ENACTING ARIZ.REV.STAT.ANN. § 13-1580 (CUM.SUPP. 1973) AS IT FURTHERS A LEGITIMATE STATE PURPOSE.

Petitioner neither alleges that the right to commit a felony is a fundamental right, nor that persons charged with felonies are members of a suspect class subject to invidious discrimination, therefore the only issue is: Is the state's unequal treatment in furtherance of some rational, legitimate state purpose? San Antonio Independent School District v. Rodriguez, 411 U.S. 1,

55, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); and Virginian R. Co. v. System, 410 U.S. 263, 270, 276, 93 S.Ct. 1052, 35 L.Ed.2d 282 (1973).

As long ago as 1895, this Court stated:

> "The general doctrine [equal protection] is that the amendment [14th.], in respect of the administration of criminal justice, requires that no different degree or higher punishment shall be imposed on one than is imposed on all for like offenses; but it was not designed to interfere with the power of the state to protect the lives, liberty, or property of its citizens, . . ."
>
> Moore, supra, at 159 U.S. 678 (emphasis supplied).

The people of Arizona acting through their legislature had every right to attempt to deter further crime by persons on release and who were already pending a felony trial. The Arizona Supreme Court answered the equal protection argument saying:

> "While it is true that the right to bail has a constitutional basis, it has always been recognized that limitations may be imposed upon it. Generally bail is granted on condition that the defendant stay within the court's jurisdiction and that he conduct himself as a law-abiding citizen . . . . [M]erely requiring that a man abide by the law is not a chilling limitation; it is a requirement that he is obliged to follow whether or not on bail . . ."
>
> Cassius, supra, at 520 P.2d 1112.

This Court has recently reaffirmed the propositions that:

> "[L]egislative solutions must be respected if the 'distinction drawn have some basis in practical experience,' . . ., or if some legitimate state interest is advance, . . ."
>
> Royster, supra, at 410 U.S. 276.

Cf. Fuller v. Oregon, ___U.S. __, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974).

It is submitted that the rational basis behind Ariz.Rev.

Stat.Ann. § 13-1580 falls with the right of the state to "protect the lives, liberty, or property of its citizens" and thus not violative of the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

Based on the foregoing precedents and reasons, respondent respectfully submits that Ariz.Rev.Stat.Ann. § 13-1580 (Cum.Supp. 1973) is not violative of the United States Constitution. The Petition for Writ of Certiorari herein should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5140

MICHAEL J. CASSIUS,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Arizona (App. 46) is reported at 110 Ariz. 485, 520 P.2d 1109 (1974); and the opinion of the Court of Appeals of the State of Arizona, Division Two, (App. 30) is reported at 21 Ariz.App. 78, 515 .P.2d 903 (1973).

JURISDICTION

The judgment of the Supreme Court of the State of Arizona was entered on April 16, 1974. A timely motion for rehearing was denied on May 21, 1974. A Petition for a Writ of Certiorari and Motion to Proceed in Forma Pauperis were filed with this Court on August 13, 1974; the petition and motion were granted on October 15, 1974. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part:

> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ."

Section One of the Fourteenth Amendment of the United States Constitution provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Eighth Amendment of the United States Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Article I, Section 10 of the United States Constitution provides in pertinent part:

> "No State shall . . . pass any Bill of Attainder . . . ."

Article 2, Section 22 of the Arizona Constitution, (*Ariz. Rev. Stat.Ann.*, Vol. 1, Supp. 1974 at 90) and § 13-1580 of the *Arizona Revised Statutes Annotated* (*Ariz. Rev.Stat.Ann.*, Vol. 5, Supp. 1973 at 328), are set forth below:

Arizona Constitution, art. 2, § 22:

> "All persons charged with crime shall be bailable by sufficient sureties, except for:
>
> 1. Capital offenses when the proof is evident or the presumption great.
>
> 2. Felony offenses, committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge."

Ariz.Rev.Stat.Ann. § 13-1580:

> "A person who is convicted of committing any felony offense, whether federal or state, which felony offense is committed while such person is released on bail or his own recognizance on a separate felony charge, is guilty of the offense of committing a felony while released on bail or his own recognizance and upon conviction of such crime shall be punished by imprisonment in the state prison for not more than five years. Such penalty shall be in addition to and shall be served consecutively to any penalty imposed for the offense committed while released on bail or on his own recognizance."

QUESTIONS PRESENTED

1. Did not petitioner's conviction of "committing a felony while on bail on felony charge," *Ariz.Rev.Stat. Ann.* § 13-1580, violate petitioner's rights under the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment to the Constitution?

2. Did not petitioner's conviction of "committing a felony while on bail on felony charge," *Ariz.Rev.Stat. Ann.* § 13-1580, violate petitioner's rights under the Equal Protection Clause of the Fourteenth Amendment to the Constitution?

STATEMENT

On October 17, 1972, petitioner, then 21 years old, was arrested and charged with burglary of a motor vehicle. The following day, he was released on his own recognizance. Case number A-22479 was subsequently assigned to this matter.

On the evening of November 4, 1972, while released on his own recognizance on the first charge, petitioner was arrested at the scene of an apparent store burglary. Petitioner was charged, Case No. A-22303, with two counts: Count I, First Degree Burglary (*Ariz.Rev.Stat. Ann.* § 13-302 (Supp. 1973)), and Count II, "committing a felony while on bail on felony charge" (*Ariz.Rev.Stat.Ann.* § 13-1580 (Supp. 1973)).

Proceedings were held on January 4, 1973, at which time, pursuant to a plea agreement, the charge in Case No. A-22479 was dismissed on the prosecutor's motion

and petitioner pleaded guilty to Count I of Case No. A-22303. Count II of Case No. A-22303 was submitted to the court on stipulated facts, the court being advised that "the public defender would like to reserve their right to examine that Statute on appeal" (App. 13). The sole stipulation accepted by the court was that petitioner had been released on his own recognizance in Case No. A-22479 on October 18, 1972, by the Justice Court, and had remained released on that charge until January 4, 1973, a stipulation which was only necessary because the court's file contained no formal release order (App. 13-14). Petitioner was found guilty.

On January 22, 1973, petitioner was sentenced to imprisonment under Count I for not less than one nor more than two years, and to a consecutive term under Count II of not less than one nor more than three years.

On appeal, petitioner argued in his briefs that his conviction under Count II violated the Constitutional protection against double jeopardy. The Arizona Court of Appeals, on November 8, 1973, reversed petitioner's conviction under Count II (*Ariz.Rev.Stat.Ann.* § 13-1580), holding, after raising the issue sua sponte, § 13-1580 violative of the Equal Protection Clause of the Fourteenth Amendment, and refusing to consider, holding it not properly preserved for appeal, petitioner's claim that the statute also subjected him to double jeopardy. *State v. Cassius*, 21 Ariz.App. 78, 515 P.2d 903 (1973) (App. 30).

The Arizona Supreme Court granted a Petition for Review by the State and petitioner, thereafter, obtained permission to file a memorandum of additional argument in which he argued both the claim of double

jeopardy and that of denial of equal protection. On April 16, 1974, the Arizona Supreme Court vacated the Court of Appeals' decision and affirmed petitioner's conviction. The Arizona Supreme Court expressly considered and rejected both petitioner's claims of double jeopardy and of denial of equal protection. *State v. Cassius*, 110 Ariz. 485, 520 P.2d 1109 (1974) (App. 46).

On October 15, 1974, this Court granted petitioner's Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENTS

I. DOUBLE JEOPARDY

Ariz.Rev.Stat.Ann. § 13-1580 makes a person who is convicted of a felony also guilty of the crime of committing a felony while on bond or recognizance if the felony was committed at a time when the defendant was released on bond or recognizance on another felony charge. Although the Arizona courts have failed to specify what the elements of a § 13-1580 offense are, the only possible element in the traditional legal meaning of the term is the commission of the underlying felony. The constituent elements of the underlying felony are the same as their sum total, commission of the felony. Thus, the offenses are the same.

If, as the State contends, the statuses of having a conviction for a felony and of having been released on bond or recognizance on another felony charge at the time the felony was committed are the elements of

§ 13-1580, then the statute punishes defendants for a status and is a legislatively imposed punishment applicable to an easily ascertainable group without the necessity of a trial. Thus, if those statuses were deemed the elements of a 13-1580 offense, the statute would be unconstitutional as cruel and unusual punishment and a bill of attainder.

II. EQUAL PROTECTION

Section 13-1580 creates two classes of convicted felons – (1) one class of persons who commit felonies while in custody, or while released into third party custody or for specified hours on a pending charge(s), or while released on a pending misdemeanor charge(s), or while not facing criminal charges; and (2) another class of persons who commit felonies while released on bond or recognizance on a felony charge(s). On the basis of this classification, the first class can be found guilty of only one felony for every felonious act committed, but the second class can be found guilty of two felonies for every felonious act committed. Section 13-1580 invidiously discriminates in the following ways: (1) more severe punishment is meted out to those who exercise a state constitutional right to release; (2) the statute punishes because of an incident to an unproved criminal charge (i.e. release on bond or recognizance) and, though released persons are presumed innocent, they are punished more severely than other presumed innocent persons; and (3) by requiring consecutive sentences, it punishes such persons for the commission of one felonious act more severely than are persons

who commit several felonious acts and may serve concurrent sentences.

The class singled out by § 13-1580 is not reasonably related to its purposes, and the statute is not demonstrably necessary to promote a compelling state interest.

ARGUMENTS

I.

PETITIONER'S CONVICTION OF ARIZ. REV.STAT.ANN. §13-1580 SUBJECTED HIM TO DOUBLE JEOPARDY

Ariz. Rev. Stat. Ann. § 13-1580 makes any "person who is convicted of committing any felony offense" also "guilty" of the felony offense set forth therein, provided only that the first offense "is committed while such person is released on bail or his own recognizance on a separate felony charge." That is, a person who is convicted of one felony offense is thereby guilty of two felony offenses. Could there be a more classic definition of multiple jeopardy for the same offense? *See, North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *Ex parte Nielsen*, 131 U.S. 176 (1889). As the Arizona Court of Appeals stated, for a "*single act*, [petitioner] has been convicted and sentenced for two felony offenses." 21 Ariz.App. at 82, 515 P.2d at 907. (App. 34).

It is important to note that § 13-1580 purports to create a separate crime and does not merely provide for an augmentation of punishment. Thus a conviction

under § 13-1580 is relevant in determining whether and to what extent a recidivist penalty provision, such as *Ariz.Rev.Stat.Ann.* §§ 13-1649 and 13-1650, should apply, and how time credits for good behavior, such as *Ariz.Rev.Stat.Ann.* § 31-251(B), will be computed. An individual's eligibility date for parole is based upon his last sentence rather than the aggregate of his sentences. *Ariz.Rev.Stat.Ann.* § 31-411; 1973 *Ariz.Op.Att'y Gen.* 55 (Op.No. 73-24). It is not clear whether or under what circumstances a reversal of the conviction for the primary offense would mandate a reversal of the conviction for § 13-1580. Unlike a penalty augmentation provision, where some discretion whether to apply the provision rests with the trial court (*see, State v. Jacobson*, 110 Ariz. 70, 515 P.2d 27 (1973)), the sole discretion whether to impose the penalty of § 13-1580 rests with the prosecutor. Because § 13-1580 purports to create a separate offense, a prosecutor, at his whim or design, may charge a defendant with a violation of § 13-1580 after a defendant has been sentenced under the primary conviction or even after a defendant has completed serving his sentence.

It also should be noted that the Constitution demands that one charged with a crime be presumed innocent until proven guilty. *In re Winship*, 397 U.S. 358 (1970). Yet § 13-1580 clearly presumes that one merely charged with a crime and thereafter released is more culpable when he thereafter commits a crime than a person not previously charged or a person previously charged and not released who commits the same crime. (See discussion *infra* at pp. 16-17.)

The Arizona Supreme Court, in rejecting petitioner's claim of double jeopardy, held that the two charges of

which he was convicted, burglary and committing a felony while released on recognizance, were not in law the same offense, but were "entirely different". (App. 48) Without ever indicating what the elements of committing a felony while released on bail or recognizance are, the court declared that "[i]t is quite obvious that the two offenses with which defendant was charged have no common element." (App. 48)

From the context of this case, it is apparent that the defendant's conviction for burglary and for § 13-1580, were jeopardy and punishment for the same offense. And it makes no difference whether the standard used for determining if there is double jeopardy for the same offense is the "same elements test", *Blockburger v. United States*, 284 U.S. 299 (1932), or the "same transaction test", *see Ashe v. Swenson*, 397 U.S. 436, 448-460 (1970) (Brennan, J., joined by Douglas & Marshall, J.J. concurring).

The State's Response to Petition for Writ of Certiorari argued that the elements of a violation of § 13-1580 are completely different from the elements of its foundational felony offense and that the elements of § 13-1580 are as follows:

> "A. Petitioner had been charged with a felony and released on bail OR release [sic]. [It will be noted that § 13-1580 does not appear to apply to a defendant released into third-party custody or on work-release, *Ariz.R. Crim.P.* 7.3(b)(2) & (6)].
> B. That while on release he committed a crime.
> C. That the crime was a felony, and
> D. That he was convicted of his second felony."

Are these in fact the elements of a § 13-1580 violation and do they in fact represent a separate offense?

In determining double jeopardy questions, this Court looks to the substance of the crimes charged. Thus, in *Ex parte Nielsen*, 131 U.S. 176 (1889), charges of plural cohabitation and adultery were found to be the same offense even though the formal charges alleged commission on different dates and adultery required proof of a marriage, which cohabitation technically did not.

From an examination of this case, it is clear that commission, but not conviction, of a felony is an element of a § 13-1580 violation. At the time Cassius was indicted for violating § 13-1580, he had not been convicted of the underlying burglary. Since a person cannot lawfully be charged in anticipation of an offense being subsequently committed, and since the Arizona Supreme Court, after examining the record for fundamental error, affirmed Cassius' conviction, it necessarily must have held that a conviction of the felony is not an element of § 13-1580. Actually, § 13-1580's reference to a conviction is for the purpose of establishing the acceptable evidence or proof of the commission of a felony. The constituent elements of a crime are the same as their sum total, conviction of the crime. Section 13-1580 would have the same meaning if instead of reading "[a] person who is convicted of committing any felony offense", it read "[a] person who is convicted of committing robbery, or burglary, or grand theft, or arson, or any other felony offense."

Further, under Arizona law, the factor of commission while released on a pending felony charge cannot be an element of a crime. A crime "is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction," penal

sanctions. *Ariz.Rev.Stat.Ann.* § 13-101 (1956). The corpus delecti, or elements, of a crime are (1) that a certain result has been produced, and (2) that some person is criminally responsible for the act. *State v. Thomas*, 78 Ariz. 52, 59, 275 P.2d 408, 413 (1954). Assuming competency, the elements of criminal responsibility are an *actus reus* (act or omission) and a *mens rea* (requisite mental state). *See* R. A derson, *Wharton's Criminal Law and Procedure* § § 60-70 (1957). The fact of being released on bond or recognizance is neither an act or omission on the defendant's part, nor a mental state, nor a consequence of the *actus reus* of *A.R.S.* § 13-1580. It is a status over which the courts have ultimate control, and the release may or may not conform to the defendant's will and volition. To illustrate, it must be conceded that if a court of competent jurisdiction orders a defendant released on his own recognizance, that defendant must be released even though he wishes to remain in jail (and there are such defendants).

If the elements of § 13-1580 were the status of being a person convicted of a felony (as opposed to use of a conviction merely as evidence of the elements of the felony) and the status of having been released on another felony charge when the felony was committed, then the statute would be patently unconstitutional.

Punishment for a status is prohibited by the Eighth Amendment's Cruel and Unusual Punishment Clause, *Robinson v. California*, 370 U.S. 660 (1962), as well as, under circumstances such as those prescribed by § 13-1580 (i.e., application to an easily ascertainable group and punishment without the necessity of an additional trial) by the Bill of Attainder Clause of art.

I, sec. 10 of the Constitution. The State of Arizona can no more make it a separate crime to be a person convicted of a felony committed while released on bail or recognizance for another felony charge than it can make it a separate crime to be convicted of a felony committed while unemployed.

Because petitioner's conviction under *Ariz.Rev.Stat. Ann.* § 13-1580 violates the Double Jeopardy Clause of the Fifth Amendment, as applied to the States by the Fourteenth Amendment, that conviction should be reversed.

II.

PETITIONER'S CONVICTION OF ARIZ. REV.STAT.ANN. §13-1580 DENIED HIM EQUAL PROTECTION OF THE LAWS

Art. 2, sec. 22 of the Arizona Constitution establishes release upon furnishing sufficient sureties as a constitutional right. Regarding this right, the Arizona Court of Appeals in its opinion in this case stated:

> "Although bail is conditioned upon the giving of 'sufficient sureties', Rendel v. Mummert, 106 Ariz. 233, 474 P.2d 824 (1970), it is nonetheless a constitutionally protected right. As stated in Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951): 'This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. [Citations omitted] Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.'" 21 Ariz.App. at 83, 515 P.2d at 908. (App. 36-37)

Having granted such a right, a state cannot implement it in such a way as to create invidious discriminations. *Griffin v. Illinois*, 351 U.S. 12 (1956). Where a discrimination has the effect of chilling or impairing the exercise of a fundamental right, the discrimination may be characterized as invidious and will only be sustained under the Equal Protection Clause if it can be shown to be demonstrably necessary to promote a compelling state interest. *E.G., Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *United States v. Jackson*, 390 U.S. 570 (1968); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *In re King*, 3 Cal.3d 226, 474 P.2d 983, 90 Cal.Rptr. 15 (1970); *Spillers v. State*, 84 Nev. 23, 436 P.2d 18 (1968).

The effect of § 13-1580 is to create two classes of convicted felons–(1) one class of persons who commit felonies while in custody on pending untried charges or while released on pending misdemeanor charges or while released into third party custody or for specified hours on pending felony charges or while not facing criminal charges, and (2) another class of persons who commit felonies while released on bond or recognizance on pending untried felony charges. The sole difference between those awaiting trial on felony charges in the two classes is that those in the second class have exercised their constitutional right to complete release. On the basis of this distinction, the second class is found guilty of two felonies for every felonious act committed, while the first class is found guilty of only one. The Arizona Court of Appeals ably illustrated how this discrimination operates:

> "A and B are both arrested and charged with burglary. A is released on bail and B remains in jail. While released, A commits aggravated battery on a police officer. While in jail, B also commits aggravated battery on a police officer. Pursuant to a plea bargain, the original burglary charges against both A and B are dropped in exchange for a plea of guilty to the battery charges. Notwithstanding the fact that A and B have committed identical crimes, A may be convicted of two crimes–(1) aggravated battery and (2) committing a felony while released on bail or own recognizance. However, B can only be convicted of aggravated battery because his crime was committed in jail. Taken one step further, assume that A had been mistakenly accused and was totally innocent of the burglary [sic] charge. Under A.R.S. § 13-1580 he may still be convicted of two criminal offenses for the single battery solely because the act was committed while on bail." 21 Ariz.App. at 84, 515 P.2d at 909. (App. 38-39)

It should be added that the decision whether and when to charge the additional offense of § 13-1580 is left solely to the prosecutor's discretion. (See discussion, *supra* at p. 9)

The Arizona Court of Appeals correctly stated:

> "A.R.S. § 13-1580 not only prescribes different penalties for the same offense, but also creates an additional crime for the same offense, which crime can only be committed after one has exercised his constitutional right to bail.
>
> . . . Making it an offense to be convicted of a felony which was committed while on bail neither helps secure the attendance of a defendant at trial nor insures compliance with the legal processes of this State. It serves no other purpose than to make

bail an instrument of oppression which our Supreme Court has denounced. [*Gusick v. Boies* 72 Ariz. 309, 734 P.2d 430 (1951)]. Our legislature has effectively chilled the assertion of the constitutional right to bail by penalizing those who have chosen to exercise it.

Regardless of the character of the crime, an accused on bail is clothed with the presumption of innocence. *Gusick*, supra. By singling out those admitted to bail, *A.R.S.* § 13-1580 strips the innocent of that presumption. One accused of a crime is not *ipso facto* a menace to society as *A.R.S.* § 13-1580 seems to presume. Such a presumption erodes the very foundation of our system of criminal justice, namely, the presumption of innocence." 21 Ariz.App. at 85, 515 P.2d at 910. (App. 40).

The Due Process Clause of the Fourteenth Amendment demands that one charged with a crime be presumed innocent, just as one who is not charged, until proven guilty beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). But, as the Arizona Court of Appeals pointed out, § 13-1580 punishes persons who commit a felony only if the felony is committed while released on another felony charge. It matters not whether the charge under which the accused was released is completely frivolous; it matters not that the accused is subsequently adjudged innocent of the charge under which he was released; he is singled out for more severe punishment than other presumptively innocent people. In this sense § 13-1580 is distinguishable from recidivist statutes which impose more severe punishment only where a person has been convicted of the prior charge. Punishment which treats one person more severely because of an unproved

charge than it does another presumptively innocent person convicted of the same act invidiously discriminates; the discrimination is not reasonably related to any lawful purposes the statute may be designed to serve and it contravenes the presumption of innocence. *Cf. Rinaldi v. Yeager*, 384 U.S. 305 (1966).

Section 13-1580, though chilling a right hallowed in Anglo-American jurisprudence and protected by the Arizona Constitution, and contravening the Constitutional presumption of innocence, is not demonstrably necessary to promote a compelling state interest. The duty of an individual to obey the law exists and draws its vitality independently of § 13-1580. Release from custody is conditioned upon good behavior, *Ariz.Rev. Stat.Ann.* § 13-1577 (D); such release can be revoked upon a breach of that condition, *Rendel v. Mummert*, 106 Ariz. 233, 474 P.2d 824 (1970), *Ariz.Rev.Stat. Ann.* § 13-1578; and subsequent release can be denied, Arizona Constitution art. 2, sec. 22 (2). The fact that a crime was committed while the defendant was released on another pending charge is certainly a matter which the trial court can take into consideration in determining the severity of the penalty to be imposed. *Cf. Williams v. New York*, 337 U.S. 241, 246-49 (1949); *State v. Killian*, 91 Ariz. 140, 370 P.2d 287 (1962).

Further, § 13-1580 requires that the sentence therein provided be served consecutively to the sentence for the offense committed while on release. Such a requirement of consecutive service of sentences appears nowhere else in the Arizona statutes. There can be no rational basis for allowing one who commits two separate burglaries to serve concurrent sentences on these offenses, while a person who commits only one burglary must serve two

consecutive sentences merely because his burglary was committed while he was released on a pending charge of which he was presumed innocent. Such an unreasonable disparity in sentencing practices and severity, practiced upon a class of persons presumed innocent of the charges for which they were released, who were released as was their right under the State Constitution, also violates the Equal Protection Clause. *See James v. Strange*, 407 U.S. 128 (1972).

Because petitioner's conviction under *Ariz.Rev.Stat. Ann.* § 13-1580 violates the Equal Protection Clause of the Fourteenth Amendment, that conviction should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Arizona Supreme Court should be reversed and the case remanded with instructions that the judgment of conviction for *Ariz.Rev.Stat.Ann.* § 13-1580 and sentence imposed thereon be ordered vacated and the charge of violation of *Ariz.Rev.Stat.Ann.* § 13-1580 contained in Count II of the indictment against petitioner be dismissed.

Respectfully submitted,

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NOVEMBER 1974

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5140

MICHAEL J. CASSIUS,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

BRIEF FOR THE RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-5140

MICHAEL J. CASSIUS,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF ARIZONA

BRIEF FOR THE RESPONDENT

SUMMARY OF ARGUMENTS

I.

DOUBLE JEOPARDY

Although there are a number of tests

for determining if offenses are the same within the double jeopardy protection of the Fifth Amendment, the one generally employed in multiple punishment situations is the "same evidence" test. Under this test if each offense requires proof that the other does not, they are not the same and a person convicted of and punished for both has not twice been placed in jeopardy. Convicting petitioner of burglary (A.R.S. §13-302) required proof of those facts comprising the burglary. His conviction of having been convicted of a felony while on bail (A.R.S. §13-1580) required proof, not of the acts comprising the burglary, but of the conviction of the burglary plus petitioner's bail status. The two do not require the "same evidence" and thus are not the same. The "same transaction" test is ordinarily applicable to multiple prosecution situations, not multiple punishments. But even if it

were applied here, a different result would not obtain for it has been said to except situations of multiple punishments at one trial and situations where the second offense is not fully consummated until the first has been completed.

In many ways a conviction of A.R.S. §13-1580 is similar to enhanced punishment under a recidivist statute which statutes have been upheld by this Court as constitutional.

Finally, although petitioner's being on his own recognizance at the time of his second burglary may be termed a status, his conviction of acts while in that status did not amount to an unconstitutional infringement analogous to that condemned in Robinson v. California, 370 U.S. 660 (1962).

II.

EQUAL PROTECTION

The reasonable condition imposed on

the right to bail by 1580 that a person released must obey the law does not infringe or chill the exercise of the right to bail. Thus, examination of 1580 should be made under the "rational basis" equal protection test of the Fourteenth Amendment.

Under the rational basis test, it is reasonable to impose a condition that a person released pending trial not violate any laws, because as a defendant's convictions accumulate his motive to not appear increases. Since the purpose of bail is to secure appearance at trial, 1580 is therefore rationally related to that purpose.

1580 does not violate the equal protection clause because it does not penalize a person for exercising his right to bail, but merely requires that a defendant not violate any laws and thus penalizes violation of the law and his conditional pre-trial release. Thus, although Arizona

does not make failure to appear a separate offense like most states, 1580 is analogous to such provisions.

The presumption of innocence is unaffected by 1580 because: (1) a defendant must be convicted beyond a reasonable doubt before he is punished under 1580; and, (2) bail is not automatically forfeited under 1580 but a hearing and high standard must be met before bail is revoked. This procedure is consonant with the rules that the right to bail is not absolute and that bail can be withdrawn completely for certain offenses. Also, imposing restrictions on a person under indictment has been upheld under the federal code.

Finally, even if the "compelling state interest" test must determine the constitutionality of 1580, the provisions of that section do not violate equal protection: (1) the compelling state interest test is a matter of degree;

(2) absolute mathematical asymmetry is not required to meet this test; and, (3) 1580 satisfies the compelling state interest test as refined by this Court because it serves a legitimate state interest and has a substantial relationship to the purpose of pre-trial release statutes and rules.

ARGUMENTS

1.

Immediately after pleading guilty to burglary, the first count of a two-count indictment, petitioner went to trial on the second count which charged him with committing and having been convicted of the burglary in Count One while released on his own recognizance on yet another, second burglary charge. By stipulation, he was tried before a judge without a jury, found guilty on the basis of the stipulation and given a sentence (one to three years) consecutive to that given on the burglary (one to two years). It is this consecutive sentence which petitioner argues punished him twice for the same offense, placing him twice in jeopardy.

The Fifth Amendment prohibition against twice putting a person in jeopardy provides at least three different types of

protection. It bars retrial for the same offense after acquittal [United States v. Ball, 163 U.S. 662 (1896); Green v. United States, 355 U.S. 184 (1957)]; retrial for the same offense after conviction [In re Nielsen, 131 U.S. 176 (1889)] and multiple punishment for the same offense [North Carolina v. Pearce, 395 U.S. 711 (1969); United States v. Benz, 282 U.S. 304 (1931); Ex Parte Lange, 18 Wall. 163 (1874)].

Common to all is one element -- the same offense. If the offense is the same, a person may not be retried after conviction or acquittal and he may not be punished a second time.[1]

Although a number of tests have been employed to deal with the same offense

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[1] Petitioner does not here and has never before complained that he has been put to trial twice for the same offense. He has complained only that he has been punished twice.

problem, it appears as though courts in general have narrowed the field to two.[2]

One is the "same transaction" test. This test focuses upon the criminal act or intent and all offenses committed by the defendant arising out of the same transaction or episode must be charged and tried at the same time. Thus, multiple prosecutions are prohibited where they emanate from a single transaction. Illustrative are Spannell v. Texas, 83 Tex.Crim. 418, 203 S.W. 357 (1918) and State v. Mowser, 92 N.J.L. 474, 106 A. 416 (1919). See Hoag v. New Jersey, 356 U.S. 464, 473 (1958) (Warren, C. J., dissenting); Ashe v. Swenson, 397 U.S. 436, 448 (1970) (Brennan, J., concurring); Ballerini v. Aderholt

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[2] 7 Brooklyn L. Rev. 79; 11 Stan.L. Rev. 735; 75 Yale L.J. 262; 65 Yale L.J. 339; 58 Yale L.J. 513; 57 Yale L.J. 132.

(5th Cir., 1930) 44 F.2d 352.[3]

The other, more widely used, test is the "same evidence", "identity of offenses" or "distinct fact" test. Here offenses are the same if the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. Or, to put it another way:

> "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932).[4]

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[3] Later disapproved by Blockburger v. United States, 284 U.S. 299, 304 (1932), in multiple punishment situations. Discussed in Respondent's Brief, infra at 23.

[4] Albrecht v. United States, 273 U.S. 1 (1927); Morgan v. Devine, 237 U.S. 632 (1915); Ebeling v. Morgan, 237 U.S. 625 (1915); Burton v. United States, 202 U.S. 344 (1915); Gavieres v. United States, 220 U.S. 338 (1911); Carter v. McClaughry, 183 U.S. 365 (1902). Gavieres and Ebeling present different factual and procedural situations that detract from their usefulness here. Gavieres concerned two trials, each under a different statute describing a different offense but both stemming from the same act. Ebeling concerned one trial for the tearing open of a number of different mailbags during one episode. Policy considerations might well dictate the choice of a different test for the sameness of offenses where there are two trials or two different mailbags. See Ashe v. Swenson, 397 U.S. 436 (1970) (Brennan, J., concurring); 11 Stan.L. Rev. 735.

In Blockburger, this Court found two separate offenses from one sale of narcotics which violated two federal statutes, one prohibiting sales except from the original stamped package, the other forbidding a sale not in pursuance of a written order from the buyer. Although there was but one sale, this Court noted that each of the violated statutes required proof of a different element and there were, therefore, two offenses committed.

Burglary, which in Arizona consists of an entry coupled with an illegal intent, is quite different from A.R.S. §13-1580 and each, in fact, does require proof of a different fact or element. Unlike burglary, 1580 requires (1) proof of conviction of a felony (not necessarily a burglary) and (2) proof that that felony was committed while the defendant was released on bail or on his own recognizance. Burglary may be proved without any evidence of the defendant's bail status and 1580 may be proved without any evidence of the facts constituting the act of burglary. The two offenses are simply not the same; the trial of each requires different evidence, each does have at least one element that the other does not and each was obviously designed to protect a different state interest.

Here, too, there is an additional factor that was not present in Blockburger

giving more strength to respondent's argument. Once the sale was completed in Blockburger, the crimes, all three, were also complete; there was nothing left to be done for them to ripen into an offense. That is not true here for the completion of the acts constituting the burglary did not complete all of the necessary acts for a conviction under 1580. Before the burglary could ripen into a fully completed 1580 offense, there had to be a conviction on the burglary. Without that conviction, there could be no conviction under 1580. In a very real sense, then, these two offenses could never be the same because one cannot occur until there is a conviction on the other.

How, then, as petitioner argues, can the state charge him with both at the same time before there is a conviction on one for until there is, the second crime has not been committed? First, it should

be noted that this issue was never raised in the state courts and should not be passed upon by this Court at this point. Tacon v. Arizona, 410 U.S. 351 (1973). Beyond that, the answer lies in an analogy to the enhanced punishment statutes.[5] Such statutes have been upheld by this Court against double jeopardy attacks even where the enhancing process is a different, even subsequent procedure to the trial which triggers it. Graham v. West Virginia, 224 U.S. 616 (1912); McDonald v. Massachusetts, 180 U.S. 311 (1901); Moore v. Missouri, 159 U.S. 673 (1895). True, this analogy breaks down in two areas: (1) enhanced punishment statutes do not punish anew for the old crime, they punish the present one more severely because of the older crime; and

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[5] Arizona's are typical. A.R.S. §§13-1649 and 1650.

(2) the enhanced punishment statutes do not create a new offense. Since Arizona's 1580 does create a new offense and it does punish anew, it is not a typical enhanced punishment statute. It does, however, act much in the same manner, has some of the same procedural attributes and serves analogous state interests. 1580 is triggered only after conviction, it will ordinarily be a short, perfunctory process, it does result in enhanced punishment and it seeks to deter those who would commit felonies evincing more than average proclivities to thwart criminal justice procedures. There is also a close analogy in this regard to the District of Columbia statute increasing the penalty for an offense committed while on bond. D.C. Code Ann. 23-1328. All three procedures seek to increase penalties for offenses committed in what legislators have determined are aggravated situations. The fact

that Arizona creates a separate offense to accomplish this which offense cannot be fully committed until conviction of the triggering felony does not, of itself, show that the method selected is unconstitutional. In fact, the constitutional safeguards afforded a defendant in Arizona under 1580 may well be in excess of what he would be afforded in the District of Columbia or a state having an enhanced punishment statute.

Petitioner argues that even within the Blockburger test, the proof here was the same because for each conviction the state proved the same essential fact -- a burglary, the same burglary. Therefore, upon the same set of proved facts, he is being punished for two crimes whereas someone else who performed the same act while not being on bail would be punished only for one crime. This argument fails in two particulars. First, the same

proof is not presented at both trials. At the burglary trial the state offers evidence of the petitioner's acts that led to the burglary. Here, his being found in a closed commercial building at night gathering items. At the 1580 trial the proof is not of the acts, but the conviction that resulted from those acts plus petitioner's bail status. Secondly, the "required proof" Blockburger speaks of is not the proof that is actually presented but the theoretical proof a conviction would require, or, put another way, the essence of the violation not the evidence. This aspect of Blockburger was brought into sharp focus in an opinion by this Court twenty-seven years later, Harris v. United States, 359 U.S. 19 (1959). Harris was charged in a two-count indictment with purchasing heroin from an unstamped package and receiving the same heroin knowing it to have been unlawfully imported.

For its evidence as to both counts, the government introduced the heroin itself and testimony that Harris possessed it. For the rest of its proof, the government rested upon two statutory presumptions: (1) that the absence of a tax paid stamp raised a prima facie case that the heroin was purchased not in the original stamped package, and (2) that possession alone authorized a conviction for receiving knowing it to have been unlawfully imported.[6] Mr. Harris maintained that, on the basis of Blockburger, the two cumulative sentences could not stand because both were based on the single act of possession. This Court disagreed, stating that were Blockburger to apply, the elements of the violated

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[6] These presumptions have subsequently been upheld, as to heroin, against constitutional attack in Turner v. United States, 396 U.S. 398 (1970).

statutes could not be equated with possession alone.[7] The government was required to prove more than mere possession; purchase plus something other than an original stamped package for the first count and, as to the second count, receipt and concealment of the narcotics, importation contrary to the law and Harris' knowledge of that illegal importation. The Court noted that it distinguished the violation from the evidence offered to prove it.

Two other cases are important to this aspect of the Blockburger test, Pinkerton v. United States, 328 U.S. 640 (1946) and Pereira v. United States, 347 U.S. 1 (1953). The Pinkerton brothers were charged with conspiracy and substantive offenses, some of the overt acts charged as

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[7] The Court felt the issue controlled more by Gore v. United States, 357 U.S. 386 (1958) than Blockburger.

part of the conspiracy were also charged and proved as the substantive offenses. Against one brother there was no direct evidence of his participation in the substantive offenses, the only evidence linking him to such acts was his participation in the conspiracy. Thus, for the act of conspiracy he was convicted and sentenced for the conspiracy as well as for the substantive acts. In Pereira the defendant was given sentences for transporting property in interstate commerce and using the mails to defraud. On the basis of Blockburger, both sentences were upheld even though the act that violated both statutes was the placing of a check obtained by fraud with an El Paso bank realizing that it would be sent by mail to another state. In each case, then, the concern of this Court was not what the proof was at the trial but what theoretical proof was necessary to sustain the charges.

Perhaps the most recent case on this point and one of the latest in the long line of "same evidence" test cases is Gore v. United States, 357 U.S. 386 (1958). Mr. Gore was charged in six counts with selling heroin not in pursuance of a written order (two counts), selling not from the original stamped package (two counts), and selling with knowledge that the heroin had been unlawfully imported (two counts). The six counts were built around two sale transactions, each transaction resulting in three counts alleging three distinct charges under different statutes. After conviction, consecutive sentences were imposed on each of the three counts pertaining to each sale and the total sentences on each sale were made to run concurrently with each other. Although noting that some had questioned the continued vitality of Blockburger, this Court reaffirmed its

holding that multiple punishments may be imposed on the consequences of a single sale of narcotics where separate statutory offenses are included in the same transaction.

This disquiet with Blockburger, noted by the majority in Gore, was apparently a feeling among some that the "same evidence" test was being abandoned in favor of the "same transaction" test. A finger had been placed on this feeling by the concurring opinion of Circuit Judge Bazelon in the Gore opinion below, Gore v. United States (D.C. Cir. 1957) 244 F.2d 763. As food for this thought, he cited United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952); Bell v. United States, 349 U.S. 81 (1955) and Prince v. United States, 352 U.S. 322 (1957).

The Gore majority met the challenge head on, distinguished those cases as dealing with disparate situations and

reaffirmed the vitality of Blockburger in multiple punishment situations.[8]

By reaffirming Blockburger, the Court, indirectly at least, gave new vitality to its prior, almost express, disapproval of the use of the "same transaction" test in multiple punishment situations.[9] The "same transaction"

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[8] Bell was distinguished as dealing with a statute (the Mann Act) where Congress had not expressed its will as to the allowable units of prosecution under it, thus calling for a judicial resolution of the doubt. The resolution being that where Congress had not expressed itself, the Court would decide in favor of lenity, which in that case was that the transportation of more than one woman was to be dealt with as a single offense. Universal C.I.T. and Prince fared no better; lenity requiring that the record-keeping provisions of the Fair Labor Standards Act be treated as one course of conduct and Prince as dealing with a unique statute of limited purpose. 357 U.S. 386, 391, 392.

[9] In Blockburger, the Court stated, "The case of Ballerini v. Aderholt, 44 F.(2d) 352, is not in harmony with these views and is disapproved." 284 U.S. 299, 304 . Ballerini was a Fifth Circuit case

test is generally not recognized as applying to multiple punishments resulting from one trial; it is aimed at multiple prosecutions and "the underlying idea . . . that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . ."

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dealing with one sale of opium violating two statutes, a sale not having paid the tax and a sale without a written order from the purchaser. In the trial court two crimes were charged and consecutive sentences were imposed upon the convictions. The Fifth Circuit reversed, holding that the sale was the essence of the transaction and that several crimes could not be carved out of that one unlawful act. It is arguable that this is not the "same transaction" test for that test would permit multiple charges and sentences as long as they all resulted from the same trial. See Ashe v. Swenson, 397 U.S. 436, 448 (Brennan, Douglas & Marshall, JJ., concurring).

Green v. United States, 355 U.S. 184, 187. Thus, it is not necessary to argue "same transaction" here. The tests are not competitors; the "same evidence" test safeguards Fifth Amendment rights in multiple punishment situations, "same transaction" in multiple prosecutions. See Ashe v. Swenson, 397 U.S. 436, 448 (Brennan, Douglas & Marshall, JJ., concurring); Abbate v. United States, 359 U.S. 187, 196 (Brennan & Marshall, JJ., separate opinion); Gore v. United States, 357 U.S. 386, 395 (Douglas, Marshall, J., dissenting). Moreover, the "same transaction" test should make an exception of our case -- where both crimes are not completed at the same time. See Ashe, supra, at 453 (Brennan, Douglas & Marshall, JJ., concurring); Diaz v. United States, 223 U.S. 442, 448-449 (1912).

In re Nielsen, 131 U.S. 176 (1889) is not controlling here. That case dealt with a subsequent trial and has not generally been regarded as setting precedent for single

trial situations. Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967); United States v. Gills, 357 F.2d 299 (4th Cir. 1966), cert. denied, 384 U.S. 933 (1966); Forsberg v. United States, 351 F.2d 242 (9th Cir. 1965), cert. denied, 383 U.S. 950 (1966). See Abbate v. United States, 359 U.S. 187, 196 (Brennan, J., separate opinion).

The Fifth Amendment does not put a limitation on legislative divisions of conduct into several substantive offenses, fixing a punishment on each. It does, however, forbid a court from multiplying punishments when the legislature intended only one. See Albrecht v. United States, 273 U.S. 1 (1926); 11 Stan.L.Rev. 735. Blockburger's "same evidence" test is a tool, perhaps simplistic, for making that determination -- if one crime contains an element the other does not, the legislature intended a punishment for each. Perhaps, as has been suggested

before,[10] the "same evidence" test doesn't go far enough, it merely points up a difference, not indicating which differences are major warranting two punishments. Legislative history and intent supply that dimension.

In Arizona it is evident the Legislature intended burglary and 1580 to be separate offenses and each to be severally punished. In 1969, in part at least because of a public clamor to update its bail structure and examine the proliferating problem of those on bail continuing their criminal careers, the Arizona Legislature enacted comprehensive bail statutes. One statute proposed a constitutional amendment permitting bail by sufficient securities except for "felony offenses, committed when the person charged

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[10]See District of Columbia v. Buckley, 128 F.2d 17, 21 (D.C. Cir. 1942) (Rutledge, A.J., concurring), cert. denied, 317 U.S. 658 (1942).

is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge." Laws of 1969, H.C.R. No. 2, filed April 11, 1969. At the November 3, 1970, election, the voters passed the proposed amendment and it is now part of the Arizona Constitution, Art. 2, Sec. 22.

To complement the proposed constitutional amendment, the Legislature also passed a statute setting forth those things a judicial officer must consider in determining the method of release or amount of bail such as the circumstances of the offense charged, his family ties, his finances, his character and mental condition, his arrest and conviction record and his record of making court appearances. In addition, the statute conditioned release upon the defendant's good behavior and provided for a discretionary revocation of

the release upon a showing of probable cause that he committed a felony while on release. A.R.S. §13-1577, 1578.

On September 24, 1970, during the interval between the passing of these statutes and the ratification of the proposed constitutional amendment, the Arizona Supreme Court held A.R.S. §13-1577 and 1578 constitutional against attacks under the Arizona and United States Constitutions. Rendel v. Mummert, 106 Ariz. 233, 474 P.2d 824 (1970). Two months later the constitutional amendment was ratified and less than two years after that the Legislature passed A.R.S. §13-1580. See also 13 Ariz.L.Rev. 365-367.

All of this indicates a forceful and forthright attempt to convince those who might abuse the process that in the granting of bail society has the right to impose reasonable conditions on the conduct

of those released and that Arizona intended to insure that those conditions were met.

In addition, the very wording of 1580 shows that the Legislature had little doubt that it was creating a separate offense (". . . is guilty of the offense of . . .") to be visited with a severe punishment in addition to any other punishment for crimes committed while released on bail ("such penalty shall be in addition and shall be served consecutively to any penalty imposed for the offense committed while released on bail or on his own recognizance").

Finally, petitioner argues that if he is being punished for two separate crimes, one of them (A.R.S. §13-1580) punishes him for a status which is expressly prohibited by Robinson v. California, 370 U.S. 660 (1962). Robinson, however, does not punish for a

status. Robinson said only that the Eighth Amendment prohibited states from making narcotics addiction a crime. United States v. Brager, 474 F.2d 598 (5th Cir. 1973), cert. denied, 414 U.S. 846 (1973); United States v. Bishop, 469 F.2d 1337 (1st Cir. 1972); Castle v. United States, 347 F.2d 492 (D.C. Cir. 1964), cert. denied, 381 U.S. 929, 953 (1964), 388 U.S. 915 (1966); Jackson v. Dickson, 325 F.2d 573 (9th Cir. 1963). See Powell v. Texas, 392 U.S. 514, 533, 541 (Black, J., concurring; Fortas, J., dissenting); Duncan v. Louisiana, 391 U.S. 145, 149 (Fortas, J., dissenting); Budd v. California, 385 U.S. 909, 911 (Fortas, J., dissenting).

> "Moreover, status offenses have long been known and recognized in the criminal law. 4 Blackstone, Commentaries (Jones Ed., 1916), 170 . . ." Justice Clark dissenting in Robinson v. California, supra, 684.

It is true that when petitioner

committed his second burglary, his status was that of a charged felon on his own recognizance but neither Robinson nor any other authority cited by him would prevent a state from punishing him for that second burglary.

II.

From the earliest common law antecedents of bail in England, until the present day, "recognizances" were intended to insure the accused's appearance as the judiciary required and to demand that the accused "be of good behavior in the meantime". Compare The Queen v. Badger, 4 Q.B. 467, 114 Eng. Reprint 975, 977 (1843) with Nev.Rev.Stat. §178.487 (as amended 1973). This requirement of good behavior is a natural concomitant of the fact that a person released on "recognizance" or bail is subject to the power of the court. Although such an individual is released from the physical custody of the court (and the state), he is not released from the custody of the court to act in untrammeled freedom as the general public. In re Smiley, 66 Cal.2d 606, 58 Cal.Rptr. 579, 583, 427 P.2d 179, 183 (1967); People v. McCaughey, 261 Cal.App.2d

131, 67 Cal.Rptr. 683, 686 (1968), overruled in part on other ground, 6 Cal. 3d 693, 100 Cal.Rptr. 297, 493 P.2d 1161 (1972); State v. Chisolm, 29 Conn.Super. 339, 287 A.2d 389, 389-90 (1971); Lemme v. Langlois, 104 R.I. 352, 244 A.2d 271 (1971). The fact that bail is not absolute but subject to various conditions of the court and legislative branch merely re-emphasizes the fact that release pending trial does not give the accused release to carry on at his whim like an ordinary citizen. See 28 U.S.C. §3146 (1970); Hensley v. Municipal Court, 411 U.S. 345, 348, 351 (1973); Carlson v. Landon, 342 U.S. 524, 545 (1952); Rehman v. State of California, 85 S.Ct. 8, 9, 13 L.Ed.2d 17, 18-19 (1964, Douglas, J., Circuit J.); Stack v. Boyle, 342 U.S. 1, 4-5 (1951); Brown v. Fogel, 387 F.2d 692, 695 (4th Cir. 1967), cert. denied, 390 U.S. 1045 (1968); Brown v. United States,

410 F.2d 212, 213, 215 (5th Cir. 1969); United States ex rel. Fink v. Heyd, 408 F.2d 7 (5th Cir. 1969), cert. denied, 396 U.S. 895 (1969); Mastrian v. Hedman, 326 F.2d 708, 710-11 (8th Cir.), cert. denied, 376 U.S. 965 (1964). See also Appendix I.

Petitioner's allegations must be focused and examined from this background. Upon such inspection, along with a consideration of relevant equal protection decisions, the weakness and misconceptions of petitioner's equal protection argument become clearly apparent.

Petitioner's argument basically devolves to at least partially inconsistent assumptions that (1) respondent has granted a right to bail and has invidiously discriminated against appellant in implementing this state right to bail, and (2) respondent has "chilled" or impaired the exercise of the "fundamental right"

to bail,[11] thus requiring respondent to show that 1580 is demonstrably necessary to promote a compelling state interest. The fallacy or omission in petitioner's argument is that it assumes as true the propositions he espouses. Rather than

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[11] This Court has apparently never expressly held that the prohibition against "excessive bail" in the Eighth Amendment applies to the states through the Fourteenth Amendment, although many courts have "assumed" or held that the Eighth Amendment does apply to the states. See, e.g., Wallace v. McDonald, 369 F. Supp. 180, 185 (E.D.N.Y. 1973); United States ex rel Kane v. Bensinger, 350 F. Supp. 181, 183 (N.D. 1972), aff'd 484 F.2d 874 (7th Cir. 1973); Grady v. Iowa State Penit., 346 F.Supp. 681, 682 (N.D.Ia. 1972); Akies v. Purdy, 322 F. Supp. 38, 41 (S.D.Fla. 1970); Koen v. Long, 302 F.Supp. 1383 (E.D. Mo. 1969), aff'd 428 F.2d 876 (8th Cir. 1970), cert. denied, 401 U.S. 923 (1971); United States ex rel. Siegal v. Follette, 290 F.Supp. 632, 634 (S.D.N.Y. 1968); United States ex rel. Goodman v. Kehl, 456 F.2d 863, 868 (2nd Cir. 1972); Mastrian v. Hedman, 326 F.2d 708, 711 (8th Cir.), cert. denied, 376 U.S. 965 (1964). This Court's statements in Schilb v. Kuebel, 404 U.S. 357 (1971), seem to indicate that these courts were correct. See id. at 365.

show that a fundamental right has been impaired[12] or that respondent has implemented its statutory right to bail in a discriminatory manner, petitioner merely takes these basic and essential assumptions for granted by merely setting forth broad constitutional principles having no relation to the facts or allegations

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[12] It seems clear that the burden of showing an impairment or chilling of a fundamental right is on the petitioner. Merely because a fundamental right is involved the "compelling state interest" test does not have to be met absent such a showing. See American Party of Texas v. White, 415 U.S. 767, 781 (1974); Memorial Hospital v. Maricopa County, 415 U.S. 250, 256 (1974); Shapiro v. Thompson, 394 U.S. 618, 683 (1969) Schilb v. Kuebel, supra, n. 1, 404 U.S. at 364 (invidious discrimination necessary); Houston v. Prosser, 361 F.Supp. 295, 298 (N.D.Ga. 1973).

in this case.[13]

Despite petitioner's bare assertions, an examination of the facts presented by this case and the decisions of this Court shows that 1580 does not penalize or chill the exercise of a fundamental right or create an invidious discrimination, at least one of which is necessary in sufficient quantity to trigger the "compelling state interest" test. Before a classification will be condemned under the equal protection cause, there must be a showing

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[13] For instance, petitioner cites Sherbert v. Verner, 374 U.S. 398 (1963), as an equal protection case, but Sherbert expressly said that this Court's decision was on due process and equal protection was not reached. Id. at 409. See also Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (not equal protection basis for decision but First Amendment rights through the Fourteenth Amendment).

that the classification penalizes[14], burdens[15] or infringes[16] a fundamental right or that the classification is so unrelated to its avowed purpose that it constitutes an invidious discrimination[17]

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[14] Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (citing other cases); United States v. Jackson, 390 U.S. 570, 582 (1968); Memorial Hospital v. Maricopa County, 415 U.S. 250, 256, 257 (1974).

[15] Cleveland Board of Education v. LeFleur, 414 U.S. 632, 640 (1974); American Party of Texas v. White, 415 U.S. 767, 781, 783 (1974); Rosario v. Rockefeller, 410 U.S. 752, 760 (1973).

[16] Kusper v. Pontikes, 415 U.S. 51, 57 (1974); Roe v. Wade, 410 U.S. 113, 162-64 (1973); Rosario v. Rockefeller, 410 U.S. 752, 762 (1973).

[17] Johnson v. Robison, 415 U.S. 361, 374-75, 378 (1974); Storer v. Brown, 415 U.S. 724, 731, 736(1974); Gaffney v. Cummings, 412 U.S. 735, 741, 751-52 (1974); James v. Strange, 407 U.S. 128, 139-40 (1972); Salver Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719, 724 (1973); Rosario v. Rockefeller, 410 U.S. 752, 760, 762 (1973); Gaffney v. Cummings, 412 U.S. 735, 736, 751-52 (1972).

which serves no purpose other than to chill[18] the exercise of a constitutional right. For example, as this Court recently held in Ross v. Moffitt, 94 S.Ct. 2437 (1974), mere differences in treatment of classifications not amounting to arbitrary or invidious discrimination does not violate the equal protection clause; there is no requirement that wealthy and poor individuals be accorded absolute equality, or that all handicaps of indigents be erased. Id. at 2442-43, 2445-47. Similarly, in Storer v. Brown, 415 U.S. 724 (1974), the principle that

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[18] Shapiro v. Thompson, 394 U.S. 618, 630 (1969); United States v. Jackson, 390 U.S. 570, 582 (1968); In Re King, 11 Cal.3d 226, 234, 90 Cal.Rptr. 15, 20-21, 474 P.2d 983, 988-89 (1970); Younger v. Harris, 401 U.S. 37, 51 (1971); Koen v. Long, 302 F.Supp. 1383, 1397-98 (E.D. Mo. 1969), aff'd 428 F.2d 876 (8th Cir. 1970), cert. denied, 401 U.S. 923 (1971).

invidious or arbitrary discrimination is a necessary showing in equal protection cases was reiterated. Id. at 731-32, 737.

Thus, absolute equality among all individuals is not required under the equal protection clause, and classifications can be made between individuals or groups as long as they are not invidiously discriminatory and the state is seeking to fulfill a legitimate state interest by means having a substantial or rational connection to the purpose of the statute. Eisenstadt v. Baird, 405 U.S. 438, 446-47 (1972); Skinner v. Oklahoma, 316 U.S. 535, 540 (1942); American Party of Texas v. White, 415 U.S. 767, 781-82, 786 (1974); Storer v. Brown, supra, 415 U.S. at 729-31; Gedulig v. Aiello, 94 S.Ct. 2485, 2491, 2492 & n.20 (1974).

In the case at bar, before these principles can be applied, a mistake in petitioner's "classification" must be

corrected. Petitioner states that persons released into the custody of third parties or subject to other conditions than pure personal ("own") recognizance do not fall within 1580, which speaks of release on bail or "own recognizance". However, petitioner's argument overlooks Rule 7.1(a) of the Arizona Rules of Criminal Procedure, codified in Vol. 17 A.R.S. (1973 ed.) which defines "own recognizance" as release without a condition of "an undertaking relating to a deposit of security". Furthermore, under A.R.S. §13-1577(E) (as amended 1969) "conditions" may be attached to release on "own recognizance" or on bail. Thus, persons released under various conditions such as third party custody would fall within 1580, contrary to petitioner's assertions.

The sole distinction between the two "classes" created by 1580 is that persons released pending trial can be guilty of

another felony if they violate the mandatory conditon of Rule 7.3(a)(2) and A.R.S. §1577(D) that pre-trial release "is conditioned upon the defendant's good behavior while so released". The obligation not to violate the law also applies to those persons not released before trial. Therefore, requiring obedience to the law is not the sort of "severe" or "substantial" penalty or restriction necessary to trigger an equal protection violation. Cf. Ross v. Moffitt, supra, 94 S.Ct. at 2443-45 (1974); Storer v. Brown, supra, 415 U.S.at 735; Schilb v. Kuebel, 404 U.S. 357, 364-65, 367 (1971); Chimento v. Stark, 353 F.Supp. 1211, 1215, 1218 (D.N.Hamp. 1973), aff'd 404 U.S. 802 (1973) (mem.); Younger v. Harris, 401 U.S. 37, 51 (1971); Graves v. Barnes, 343 F.Supp. 704, 719-20, 735 (W.D. Tex. 1972), aff'd 409 U.S. 808 (1973), modified 412 U.S. 755 (1973). As noted, the

Fourteenth Amendment does not require absolute equality for all persons. Arizona, through its statutory provisions (A.R.S. §1577) Rules of Criminal Procedure (Rule 7 in passim) and its case law [see ABA Standards, Pre-Trial Release, at 5-6, (approved draft 1968)], has set up a system of pre-trial release aimed at securing the release of all criminal defendants without monetary conditions which is among the most broad and liberal provisions in the nation. (See Appendices I and II.) The enactment of 1580 was concurrent with the entire pre-trial release scheme set up in Arizona. Because release "O.R.", or "bail" without money is so strongly emphasized, protection of the public against abuse due to the increasing numbers of freed criminal defendants was only reasonable. By enacting 1580, the dubious spectre of "preventive

detention"[19] was avoided in Arizona. Instead, a defendant is released and "holds the key" to his continued pre-trial release in his pocket because all he is required to do is obey the law as ordered by the court

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[19] The problems inherent in preventive detention and the dubious likelihood of predicability under current conditions has been frequently noted. Rendel v. Mummert, 106 Ariz. 233, 238-39, 474 P.2d 824 (1970). See Just, Bail and Pre-Trial Detention in the District of Columbia: An Empirical Analysis, 17 How.L.J. 844, 852 (1972); 75 Dick.L.Rev. 639, 643, 645, 647, 649 (1970); Hess, Pre-Trial Detention, 37 Brook.L.Rev. 277, 279, 280, 283-84, 286-89, 305 (1971); Note, the Costs of Pre-Trial Detention, 79 Yale L.J. 926, 926-928, 931 & n. 19 (1970); Symposium, 8 Col.J.L. & Soc. Pb. 1, 8-9, 18 (1972); 7 Col.J.L. & Soc.Pb. 350 (1971); Note, 9 Col.J.L. & Soc. Pb. (1973); Wice, Bail Reform in American Cities, 9 Crim.L. Bull. 770, 782-83 (1973); Pfuhl & Zabezensky, 1972 L. & Soc. Order 409 (study of Phoenix release before 1973 Arizona Rules of Criminal Procedure promulgated).

when he is released. Cf. Rendel v. Mummert, 106 Ariz. 233, 238, 474 P.2d 824, 829 (1970).

The case at bar is thus amenable to the "rational basis" analysis because when the threshold requirement of a substantial infringement, penalty or burden upon a fundamental right is not met, the courts will use the rational basis test instead of the compelling interest test, even where fundamental rights are involved. See Schilb v. Kuebel, supra, 404 U.S. at 365-66; Houston v. Prosser, 361 F.Supp. 295, 298-99 (N.D.Ga. 1973).

Under the rational basis test the condition that defendants obey the law is rationally related to the purpose of bail -- assuring the defendant's presence at trial.[20] First, 1580 is similar to

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[20] E.G. Gusick v. Boies, 72 Ariz. 309, 234 P.2d 430 (1951); Carlson v. Landon, 342 U.S. 524, 545 (1952); Wagner v. United States, 250 F.2d 804, 805 (9th Cir. 1957).

the various "bail jumping"[21] statutes (see Appendix I); just because Arizona has not "gone all the way" and enacted a "failure to appear" statute but has aimed at one specific problem area of pre-trial release -- the problem of recidivism or commission of crime while released[22] -- does not make 1580 constitutionally improper. See, e.g., Skinner v. Oklahoma, 316 U.S. 535, 540 (1942); Gedulig v. Aiello, supra, 94 S.Ct. at 2491; Schilb v. Kuebel, supra, 404 U.S. at 364; Harbold v. Richardson, 464 F.2d 1063, 1065 (3rd

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[21] The national bail-jumping statute is similar to those listed in Appendix I. See 18 U.S.C.§3150 (1970). Its validity has often been upheld. E.g., United States v. Dorman, 496 F.2d 438 (4th Cir. 1974); United States v. Currier, 405 F.2d 1039 (2nd Cir. 1969), cert. denied, 395 U.S. 914 (1970).

[22] Under 1580 and Arizona law, bail is not revoked automatically upon a subsequent commission of an offense but only after a hearing with a very high burden on the prosecutor and even then the judge has discretion to continue a defendant on bail. See A.R.S. §13-1578(B) (as amended 1969).

Cir. 1972).[23]

The rationality of 1580 is buttressed by reference to the basic principles underlying bail that reasonable conditions may be imposed on pre-trial release (supra, pp. 33-35). Insuring the appearance of the defendant is the main goal of bail conditions. Thus, making failure to appear a separate felony has been upheld consistently. However, as this Court held in Hensley v. Municipal Court, 411 U.S. 345 (1973), a person released on bail cannot come and go as he pleases but his freedom of movement rests in the court's hands as a condition of release and disobedience of this condition is itself a criminal offense. Id. at 351. Similarly, any condition reasonably imposed on a defendant's pre-trial release which could threaten his appearance can be made a criminal offense by the State.

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[23] See articles listed in n. 19, supra.

For example, in People v. Sanders, _____ Colo._____, 522 P.2d 735 (1974), a statutory provision that a person released "O.R." who commits a felony or certain misdemeanors shall not be admitted to release on the later offense was upheld as having a reasonable relationship to the main goal of assuring a defendant's presence at trial.[24] Id. 522 P.2d at 736-37. As one court has held, the risk of flight increases "proportionately" with the commission of subsequent offenses while released on bail, because of the possibility of cumulative penalties and other considerations. Bigley v. Warden, Maryland Corr. Institute for Women, 16 Md.App. 1,

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[24] Sanders also pointed out the main purpose of bail is assuring presence at trial. People v. Sanders, _____ Colo._____, 522 P.2d 735, 736 (1974). Also, Sanders discussed the problem of separation of powers, since the prosecution has to ask for the defendant to be revoked from bail or O.R. status. Id. at 736-37.

294 A.2d 141, 145 (Ct. Special App. 1972). A number of other legal commentators[25] and many state and federal court decisions have recognized, either explicitly or implicitly, that commission of other offenses while released on bail is likely to enhance the chances that a defendant will flee -- as well as noting the corruption of the criminal justice system by such subsequent violations.[26]

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[25] See n. 19, supra.

[26] It would appear that the administration of justice and protecting its integrity is another rationale of the bail cases. See United States v. Cardillo, 473 F.2d 325 (4th Cir. 1973); People v. Sanders, supra, n. 13; Williams v. State, 229 So.2d 2 (Fla.App. 1969); People v. McCaughey, 261 Cal.App.2d 131 (1968) and cases cited therein. Such an interest seems constitutionally valid and recognized. See Hensley v. Muncipal Court, 411 U.S. 345 (1973); Ross v. Moffitt, 94 S.Ct. 2437, 2443-47 (1974); California Bankers Ass'n v. Schultz, 416 U.S. 21, 76-77 (1974).

State v. Chisholm, 29 Conn.Super. 339, 287 A.2d 389, 389-91 (1971); United States v. Rabena, 339 F.Supp. 1140, 1141-43 (E.D.Pa. 1972); United States v. Campbell, 314 F. Supp. 157, 159 (D.Mass. 1970); Jordan v. Peyton, 264 F.Supp. 946, 951 (W.D. Va. 1967); Pilkington v. Circuit Court of Howell County, Mo., 324 F.2d 45, 46 (8th Cir. 1963); Hansford v. United States, 353 F.2d 858, 859-60 (D.C. Cir. 1965); Williams v. State, 229 So.2d 2, 3 (Fla. App. 1969); People v. Norman, 252 Cal. App.2d 381, 60 Cal.Rptr. 609, 622-23, 631-32 (1967), cert.denied, 391 U.S. 932 (1968); Rendel v. Mummert, supra, 106 Ariz. at 237-38. See, generally, United States v. Louie, 289 F.Supp. 850, 851-52 (N.D. Cal. 1968); United States v. Gamble, 295 F.Supp. 1192, 1193-94 (S.D. Tex. 1969) (A.W.O.L. can be considered for flight but not just to punish); United States v. Erwing, 268 F.Supp. 877, 879 (N.D.Cal.

1967); United States v. Nelson, 346 F. Supp. 926, 928 (S.D. Fla. 1972), aff'd 467 F.2d 944 (5th Cir. 1972), cert. denied, 410 U.S. 956 (1973); United States v. Cardillo, 473 F.2d 325, 327 (4th Cir. 1973); Fernandez v. United States, 314 F.2d 289, 290 (9th Cir. 1963), cert. denied, 379 U.S. 832 (1964); Commonwealth v. Truesdale, 449 Pa. 325, 296 A.2d 829, 836-37 (1972); Ex Parte Jester, 403 S.W.2d 133, 134 (Ct.Cn App. Tex. 1966).

Petitioner also argues that 1580 is constitutionally reprehensible since it contravenes the presumption of innocence. However, respondent has pointed out already (see note 22, supra) that before a person can have his bail revoked for committing an offense on bail a hearing with a very high test is necessary.[27]

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[27] Such revocation is analogous to statutes which bar bail completely for various offenses or persons and which have been repeatedly upheld (A.R.S. §§13-1577 and 1580 are thus less restrictive than such statutes because the defendant may be continued on release in Arizona). See Rendel v. Mummert, supra, n. 9, at 236-38; Stack v. Boyle, 342 U.S. 1, 4-6 (1951); McCarroll v. Faust, 278 F.Supp. 448, 451-52 (E.D.La. 1968); Corbett v. Patterson, 272 F.Supp. 602, 607 (D.Colo. 1967); Richburg v. State, 238 So.2d 296, 298-300 (Fla. 1970).

Moreover, this argument is completely inconsistent with the provisions of 1580 since proof beyond a reasonable doubt of a prior conviction while released which itself has to be established beyond a reasonable doubt is necessary for a conviction under 1580. Allegations that the federal statute making it a crime for a person under indictment for an offense (even a state indictment) to possess and ship arms or ammunition in interstate commerce violates the equal protection and due process clauses have been consistently rejected. United States v. Thoreson, 428

F.2d 654, 659-62 (9th Cir. 1970); United States v. DePugh, 266 F.Supp. 453, 454-55 (W.D. Mo. 1967), cert. denied, 393 U.S. 832 (1968). The rationale of these cases is that the defendant still comes to trial clothed with his presumption of innocence.[28] United States v. Thoreson, supra, 428 F.2d at 661. Likewise, the defendant in a 1580 case never loses his presumption of innocence.

Likewise, petitioner's argument that 1580 is somehow invalid because the prosecutor has discretion to proceed under it or not is spurious, since such discretion arguably applies to all statutes and has not been found unconstitutional absent some showing of discrimination. See United States v. Clearfield, 358 F.Supp. 564, 577-78 (E.D.Pa. 1973); United States v. Maplewood Poultry Co., 320 F.Supp. 1395

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[28] See Hess, supra, n. 9, at 305, n. 163.

1396 (N.D. Maine 1970); Washington v. United States, 401 F.2d 915, 923-25 (D.C. Cir. 1968); 65 J.Crim.L. & Criminology 62 (1974); 72 Mich.L.Rev. 1113 (1974).

Although respondent submits that petitioner has made an inadequate showing[29] to merit review under the "compelling state interest" equal protection test, 1580 is not constitutionally infirm and should be upheld even under this test. At present, the status of equal protection cases in general, and compelling interest cases specifically, can be characterized as one of variegated inconsistency. At least, this is the impression conveyed by numerous legal commentators reviewing this Court's latest equal protection cases.[30]

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[29] It is debatable whether petitioner has even shown an identifiable "class" as that term is defined by this Court. See generally Gordon v. Vance, 403 U.S. 1, 5, 7 (1971).

[30] According to a general review of legal commentators, this Court's dissatisfaction with the "two-tiered" equal protection

Respondent submits, however, that perusal of recent equal protection cases handed down by this Court provides sufficiently cogent and articulable standards upon which to resolve this case.

It is true that this Court has recognized that the compelling interest test

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tests has led to uncertain wavering and decision by speculation because this Court has adopted (or wants to or should adopt), a "new" equal protection test sub silentio. See, e.g., Nowak, Realigning the Standards of Review Under the Equal Protection Guarantee -- Prohibited, Neutral, and Permissive Classifications, 62 Geo.L.J. 1071, 1122 (1974); Note, 62 Geo. L.J. 1173 (1974); Gunther, The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv.L. Rev. 1, 8, 22-24, 25-26 (1972); Note, 26 Stan.L.Rev. 155, 163-64 (1973); 59 Cornell L.Rev. 1139, 1143, 1159-60 (1974); 53 Nebr.L.Rev. 312, 317-20 (1974); Symposium, 23 Emory L.Rev. 643-723 (1974); Comment, 41 Fordham L.Rev. 605 (1973); 25 Vand.L. Rev. 180, 183, 193-95 (1972); Note, 82 Yale L.J. 123, 128 (1972); Tushnet, 1974 Wisc.L.Rev. 77, 196; 58 Minn.L.Rev. 965 (1974).

has been "variously formulated". In re Griffiths, 413 U.S. 717, 721 (1973). Nevertheless, in Griffiths this Court went on to collate these "variances" and held that the compelling interest cases as a whole have established a principle or test which requires the State to meet certain standards of proof in order to justify the use of suspect classifications, to wit, the state must show its interest or purpose is both constitutionally permissible and substantial, as well as showing that the classification is necessary to the accomplishment of this purpose or to the safeguarding of its interest. Id. at 721-22 and nn. 8-11.[31]

This formulation or explanation of

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[31] In Griffiths, the total exclusion of aliens from the practice of law was held to violate equal protection. In re Griffiths, 413 U.S.717, 718, 724-29 (1973).

the compelling interest test should scarcely be startling or "new" in light of the holding in Eisenstadt v. Baird, 405 U.S. 438, 446-47 (1972), that the compelling interest test requires a fair and substantial relationship to legitimate state purposes and that persons similarly situated should be treated alike. See Reed v. Reed, 410 U.S. 71, 75-77 (1971). What is essentially the same formulation was set forth in Dunn v. Blumstein, 405 U.S. 330 (1972), which held that in determining whether there is an equal protection violation this Court will look to three things: (1) the character of the classification in question; (2) the individual interest affected by the classification; and, (3) the governmental interests asserted in support of

the classification.[32] Id. at 335.

Perhaps the most important principle pointed out and followed in Dunn in later cases is the holding that the "key words" in the compelling interest test are really a matter of degree, which cannot just be rigidly affixed to the plethora of legal situations they will have to be applied to, like a "litmus paper" can be in scientific analyses. Id. at 343, 348; Ross v. Moffitt, supra, 94 S.Ct. at 2445; Storer v. Brown, supra, 415 U.S. at 729-31. The compelling interest test is not an

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[32] It would appear that this three-pronged test is considered more in the nature of broad, general guidelines which still need further specification such as Griffiths and Eisenstadt. This three-pronged guideline (or starting point) has been reiterated numerous times. E.G., Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719, 725 (1973); see Williams v. Rhodes, 393 U.S. 23, 30 (1968) (slight variation in wording).

"absolute" shibboleth used to justify the Court's pre-determined resolution of a case. Instead, the compelling interest test is flexible, a matter of degrees which must be re-aligned for the facts of each case. Thus, for varying situations slightly different considerations predominate or are considered in affixing the "degree" to which governmental action is permissible versus the degree of the individual's interest affected by the action. See Ross v. Moffitt, supra, 94 S.Ct. at 2444-45 (main consideration degree of discrimination or inequality permissible); Storer v. Brown, supra, 415 U.S. at 730 (major consideration the degree to which "hard" governmental judgments which must be made are proper versus when degree of lines becomes invidious or arbitrary); Gedulig v. Aiello, 94 S.Ct. 2485, 2490-92, n. 20 (1974) (determination made by degree of legitimate governmental limitation

permissible before degree becomes invidious or arbitrary); Gaffney v. Cummings, 412 U.S. 735, 741, 743, 751-54 (1973) (nature of interests made degree turn on the issue of whether the line was crossed to invidious or discriminatory point). Thus, in Frontiero v. Richardson, 411 U.S. 677 (1973), the determination of whether a forbidden degree of governmental intrusion occurred over the line of individual rights devolved to (1) whether basic concepts, such as the necessity of legal burdens having to bear some relationship to individual responsibility, rather than inherent or immutable characteristics (e.g., gender) were remembered, and (2) whether the basically neutral or proper purpose of administrative convenience crossed the line to a degree constituting its recitation as a shibboleth of constitutionality where none really exists. Id. at 686-87, 690-91.

Before applying these broad principles to the case at bar, rather than merely reciting them as petitioner does, three other considerations or rules established by this Court should be set forth. First, since the compelling interest test is a matter of degrees, it does not require meeting impossible or unrelenting standards or barriers -- as exemplified by the rules just set forth supra.[33] Second, even in

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[33] At least a portion of the legal commentators' consternation at this Court's willingness to make the compelling interest test meaningful rather a simple excuse for invalidation of disfavored laws is their failure to recognize that equal protection, just like due process, is flexible and not a "frozen" list of categories. See Dillenberg v. Kramer, 469 F.2d 1222, 1224, 1226 (9th Cir. 1972) (applying "general", three-part test of Dunn, court noted equal protection concepts are not "immutably frozen like insects in . . . Devonian amber").

The fact that the compelling interest test does not mandate meeting rigid, narrow and virtually perfect models of absolute preciseness is shown by the kind of cases which have held the compelling interest test met. See, e.g., Mon Chi

areas involving fundamental rights mathematical formulas for scientific asymmetry weighed on a jeweler's scale cannot be, and are not required to uphold the hard and unscientific judgments legislators must reach in defining and passing legislative enactments (i.e., "degrees"). Skinner v. Oklahoma, supra, 316 U.S. at 540; James v. Strange, 407 U.S. 128, 13[illegible] (1972); Dunn v. Blumstein, supra, 405 U.S. at 342; Gaffney v. Cummings, supra, 412 U.S. at 743. Finally, merely because a legislative enactment "manifests a concern

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Heung Au v. Lum, 360 F.Supp. 219, 222 (D.Haw. 1973) (state's interest in eliminating fraudulent assertions of domicile -- in this case, however, irrebutable durational presumptions were improper); Chimento v. Stark, 353 F.Supp. 1211, 1214-15, 1217-18 (D.N. Hamp.), aff'd 414 U.S. 802 (1973) (seven year residency requirement to run for governor promotes legitimate state interests of first-hand knowledge and familiarity with state problems and excluding "frivolous" candidates); cf. Schilb v. Kuebel, 404 U.S. 357, 364-65, 367-68 (1971).

for the enforcement of the criminal law" does not cast a "generalized pall of constitutional suspicion" over it. California Bankers Ass'n v. Schultz, 416 U.S. 21, 76-77 (1974).

Finally applying these rules to 1580, it is clear this statute meets the various requirements of the compelling interest test. The purposes of 1580 are weighty and legitimate: (1) it is part of Arizona's liberal bail scheme which maximizes the pre-trial release of defendants without monetary impediments except as a last resort; (2) society has a legitimate and grave interest in insuring the presence of defendants at trials and in preventing defendants released under extremely liberal release standards from violating the conditions of their release and from violating the law in repetitious manner; and, (3) the administration of justice is undermined if defendants released under

the custody of the courts are permitted to engage in criminal activities.

The classification itself is innocuous -- it merely gives an increased or additional penalty to those who violate the law when they have been released under an express promise not to. Thus, culpability or distinction is based on the individual's own deliberated actions -- not on an inherent characteristic. Any distinctions a defendant is exposed to under 1580 are brought on by his own criminal actions. There are no invidious or arbitrary differences made where none exist. Rather, by violating the terms of his release and the laws of society, a defendant is legitimately subjected to criminal sanctions.

The sanctions themselves are not excessive in comparison to the penalties imposed in the analogous area of bail jumping. Moreover, the interests of

individuals affected by 1580 are no more than a requirement of obeying the terms of their release and obeying the laws every other citizen has to. Because of his different status in being released subject to the custody of the court and because amassing a number of criminal violations can lead to more and more serious offenses, the interests of an individual are not unduly or irrationally subjected to criminal penalties through 1580.

Respondent's final argument is that the frivolity and lack of merit in petitioner's equal protection argument is shown by the fact that the Court of Appeals decision reversed by the Supreme Court of Arizona [which forms the basis if not entirety of petitioner's equal protection argument -- see State v. Cassius, 21 Ariz.App. 78, 512 P.2d 903 (1973)], acknowledges that increased punishment

for the actions barred by 1580 would be proper [as Congress has done for the District of Columbia, D.C. Code Ann. §23-1328 (1971)]. However, the Court of Appeals held and petitioner argues that making such actions a crime is an unconstitutionally greater burden than merely enhancing punishment. Respondent submits that this distinction between making it a crime to violate release conditions and penalizing violations without making them a separate crime is constitutionally irrelevant and does not render 1580 "constitutionally vulnerable". Cf. Schilb v. Kuebel, supra, 404 U.S. at 367-68. At most, such a distinction or action merely reviews the wisdom and efficacy of 1580, which the federal courts will not do.[34]

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[34] See James v. Strange, 407 U.S. 128, 133 (1972); Kahn v. Shevin, 416 U.S. 351, 356 n. 10 (1974); Brown v. Supreme Court of Va., 359 F.Supp. 549, 554 (E.D.Va. 1973), aff'd 414 U.S. 1138 (1973) (mem.); Gordon v. Vance, 403 U.S. 1, 6-7 (1971); Renev v. Beto, 447 F.2d 20, 22 (5th Cir. 1971).

CONCLUSION

Petitioner's convictions under A.R.S. §13-301 and A.R.S. §13-1580 each required proof of an element not required by the other and thus were separate offenses not subjecting petitioner to twice being put in jeopardy.

The provisions of A.R.S. §13-1580 are rationally related to a legitimate state interest and thus satisfy the requirements of the "rational basis" test. Even if petitioner has made a sufficient showing to trigger use of the "compelling state interest" test, A.R.S. §13-1580 comports with the equal protection clause because 1580 is substantially related to furthering Arizona's valid interests while affecting the rights of individuals only as much as necessary. Therefore, petitioner's equal protection arguments are without merit.

Because of this, the judgment and

sentence affirmed by the Arizona Supreme Court in this case should be affirmed by this Court.

Respectfully submitted,

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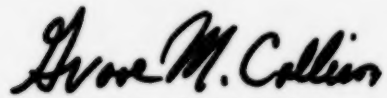

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Attorneys for RESPONDENT

DECEMBER 1974

APPENDIX I

STATUTORY BAIL JUMPING PROVISIONS OF THE VARIOUS STATES

1. Code of Ala. Title 15, §§ 185-218 (1959) - Money bail system.
   Bail Jumping Provisions: None - forfeiture of bond only.

2. Alaska Stat.'s § 12.30.020 (as amended 1974) - Released pending trial on own recognizance [hereinafter referred to as "O.R." release] or unsecured personal bond unless not likely to appear or danger to society.
   Bail Jumping Provisions: Alaska Stat. § 12.30.060 (1966) - Wilfully failing to appear for felony constitutes felony; up to five years imprisonment.

3. Ark.Stat.Ann. § 43-723.1 (as amended 1971) - Failure to appear as agreed constitutes felony (besides bail forfeiture); possible sentence, five years.

4. West's Ann. Cal. Codes, Penal - Failure to appear as agreed is felony, punishable up to five years.

5. Colo. - No bail jumping penalties except bail revocation.

6. Conn.Stat.Ann. §§ 52a-35, 172 (Vol. 27A 1972) - Person released who fails to appear guilty of felony, punishment not to exceed five years.

7. Del. Code Ann. §§ 2101-2114 (as amended 1968) - Under § 2105 release O.R. if likely to appear and no substantial risk to the community.
   Bail Jumping Provisions: Del. Code

Ann. § 2113 - Failure to appear or breach any conditions of release [§ 2108(i) allows any condition "deemed reasonably necessary"] leads to arrest warrant and failure to appear or breach of conditions is a separate crime if released on one or more felonies; sentence of up to five years possible.

8. West's Fla.Stat.Ann. § 900.131 (1973) - If a person is admitted to bail and convicted of a felony bail shall be revoked and the defendant committed "forthwith".
   See Rules of Criminal Proc. 3.130(b)(4), (e)(1972) - O.R. release.

9. Code of Ga.Ann. § 27-093 (1971) - Person entitled to "one bail" for the same offense as a "matter of right".
   Bail Jumping Provisions: Forfeiture only, no separate crime.

10. Hawaii - Forfeiture only.

11. Idaho Code § 19-2902 - Money bail.
    Bail Jumping Provisions: Idaho Code § 19-2927 - Forfeiture only.

12. Smith-Hurd Ill.Ann.Stat. Title 38, § 32-10 (as amended 1972). Wilful failure to appear is a felony.

13. Ind. Penal Code § 35-14.1-3-5 (1974). Failure to appear in a felony case is a "Class D" felony.

14. Iowa Code Ann. § 763.19 (as amended 1967) - Besides forfeiture, if person released on felony charge fails to appear shall be punished by imprisonment of not more than five years.

15. Kansas - Forfeiture and revocation only apparently.

16. Ky.Rev.Stat. (Bobbs-Merrill Official Ed. 1973) § 432.361. Failure to appear constitutes a felony; penalty one to ten years.

17. West's La.Stat.Ann. § 14:110.1 (1974) - Wilful failure to appear for a felony punishable by "hard labor" up to two years.

18. Maine Legis. Service Chap. 760, at 195-97 (approved March 27, 1974) - Failure to appear if released on felony is punishable by up to five years.

19. Ann. Code of Md., Art. 27, § 616 1/2 (c)(Cumul.Supp. 1974) - A person charged with enumerated crimes who commits a felony while released on bail or O.R. is "ineligible" to give bail "or be released on later charge" -- but can rebut ineligibility by showing (1) not a danger to the community and (2) would appear later.
    Bail Jumping Provisions: Ann. Code of Md., Art. 27 § 12B (Cumul.Supp. 1974) - Wilful failure to appear punishable up to five years (and forfeit any money bail).

20. Mass.Gen'l L.Ann., Chap. 276, § 82A (1972) - Failure to appear "without sufficient excuse" punishable not more than one year.

21. Mich.Stat.Ann. § 28-396.1 (Cumul.Supp. 1974) - Person who "absconds" when released if charged with a felony is guilty of a felony.

22. Minn.Stat.Ann. § 609.485 (as amended 1963) - A person charged with a felony "on a condition of personally appearing" who intentionally fails to appear is guilty of a felony.

23. Miss.Code 1972 Ann. § 99-5-1, 3 - Money bond.
    Bail Jumping Provisions: Miss.Code 1972 Ann. § 583-39-29 - A person guilty of "bail jumping" is guilty of a misdemeanor with penalty up to one year.

24. Vernon's Ann.Mo.Stat. § 544.455 (as amended 1972) - O.R. ("personal recognizance") release unless exercise discretion to impose enumerated conditions.
    Bail Jumping Provisions: Person wilfully failing to appear for felony punishable by up to five years imprisonment.

25. Mont. Crim'l Code of 1973, Title 94, 1947 Rev.Code Mont., Title 94 - 7-308 (1973) - Persons released on condition of appearing is guilty of a felony; punishment not to exceed ten years.

26. Rev.Stat. of Nebr. § 29-908 (Reissue of 1974) - Persons charged and released on felonies who fail to appear are guilty of felony with sentence up to three years.

27. Nev.Rev.Stat. § 178.487 (as amended 1973) - Release before trial on bail or without security (O.R.) conditioned upon the defendant's good behavior, and upon "a showing" that the defendant has committed a felony during the period of release bail "shall be revoked" after a hearing.

    Bail Jumping Provisions: Nev.Rev. Stat. § 199.335 (1973) - Failure to appear when released in a felony case is a separate felony.

28. New Hamp.Crim'l Code (1973 Pamphlet), N.Hamp.Rev.Stat.Ann.Chap. 642:8 - A person failing to appear for certain felonies is guilty of a felony.

29. N.J.Stat.Ann. § 2A:104-13(a),(b) (1971) - Person failing to appear guilty of punishments up to seven years or three years depending on crime release is for [New Jersey has no "felonies" by definition - the common law determines if one of their crimes is a "felony" or not].

30. New Mexico Stat.Ann. § 41-3-8 (as amended 1973) - Failure to appear is a "Fourth Degree" felony.

31. McKinney's Consol.Laws of N.Y.Ann. § 215.57 (as amended 1968) - Persons released on bail or O.R. on a condition of appearing are guilty of a "Class E" felony if fail to appear.

32. Gen'l Stat.N.C. § 15-103.1(b)(Cumul. Supp. 1973) - Every person wilfully failing to appear or violating any condition of his release is guilty of a misdemeanor
    See also Id. § 15-104.1 (1971).

33. N.Dak.Century Code § 29-08-27 (1973) - Wilful failure to appear is a misdemeanor.

34. Ohio Code Supplement § 2937.99 (as amended 1965) - Failure to appear punishable by sentence of up to five years.

35. Okla.Stat. 1971, Art. 22, § 1111 (1965) - "Jumping bail" a felony punishable up to one year.

36. Ore.Rev.Stat.,Chap. 162.205 (1971) - Bail jumping is a "Class C" felony.

37. Purdon's Pa.Stat.Ann., Rules 4013 & 4016 in Vol. 19 (as amended 1973) - Breach of a bail condition can lead to revoking bail. Failure to appear without excuse is a "third degree" felony - Purdon's Pa.Stat.Ann. Title 18, § 5124 (as amended 1973).

38. Rhode Island - No failure to appear provisions.

39. Code Laws of S.C., § 17-300.8 (as amended 1969) - Failure to appear a felony with possible five year penalty.

40. South Dakota - Forfeiture only.

41. Tenn. Code Ann. § 39-3813 (as amended 1963) - Bail jumping is leaving state and not appearing; felony of up to five years.

42. Vernon's Texas Code Ann., Penal, § 38. 11 (1974) - If appearance is required failure to appear is a "third degree" felony.

43. Utah Code Ann. § 76-8-13 - Failure to observe appearance condition a felony.

44. Vermont - No failure to appear provisions.

45. Code of Va., § 19.1-109.7 (as amended 1963) - Failure to appear is a misdemeanor.

46. Washington - Failure to appear subject to forfeiture or revocation only.

47. West Virginia - Forfeiture only.

48. West's Wisc.Stat.Ann. § 946.49 (as amended 1970) - Bail jumping has possible punishment of up to five years.

49. Wyoming - No failure to appear penalties.

APPENDIX II

The following states, authorization to release on own recognizance was part of major revisions of state bail laws parelleling the Federal Bail Reform Act establishing release "O.R." as the presumptive form of bail:

Alaska
Arizona
Iowa
Kansas
South Carolina
Vermont
Wyoming

However, at least thirty-six state statutes authorize releasing defendants on their own recognizance, including the seven making it favored:

Alabama: Ala. Code tit. 15, § 187 (1959).
Alaska: Alaska Stat. § 12.30.020 (1970).
Arizona: Ariz. Rev. Stat. Ann. § 13-1577 (Supp. 1970).
California: Cal. Penal Code § 1318 (West 1970).
Colorado: Colo. Rev. Stat. Ann. § 37-17-12 (1966).
Connecticut: Conn Gen. Stat. Ann. § 54-1a (Supp. 1970).
Delaware: Del. Code Ann. tit. 11, § 2104 (Supp. 1969).
Florida: Fla. Stat. Ann. § 903.03 (2) (a) 3 (Supp. 1971).
Georgia: Ga. Code Ann. § 27-911 (Supp. 1970).
Illinois: Ill. Rev. Stat. ch. 38, § 110-2 (1970).
Iowa: Iowa Code § 763.16 (Supp. 1971).

Kansas: Kan. Stat. Ann. § 22-2802 (Supp. 1970).
Louisiana: La. Rev. Stat. § 15:574.15 (1967); La. Code Crim. Pro. Ann. art. 336 (West Supp. 1971).
Maine: Me. R. Crim. P. 46 (d) (1970).
Maryland: Md. Ann. Code art. 27, § 638A (1971).
Massachusetts: Mass. Gen. Laws Ann. ch. 276, § 58 (Supp. 1971).
Michigan: Mich. Stat. Ann. § 28.872 (52) (Supp. 1971).
Minnesota: Hennepin Cty. Mun. Ct. (Crim.) R. 35.
Montana: Mont. Rev. Codes Ann. § 95-1106 (1969).
Nevada: Nev. Rev. Stat. § 178.502 (1969).
New Hampshire: N.H. Rev. Stat. Ann. § 597:1 (Supp. 1970).
New Mexico: N.M. Stat. Ann. § 36-6-6 (Supp. 1969).
New York: N.Y. Crim. Proc. Law §§ 530.10-.40 (McKinney 1970).
North Carolina: N.C. Gen. Stat. § 15-103.1 (Supp. 1969).
Ohio: Ohio Rev. Code Ann. § 2937.29 (Page Supp. 1970).
Oklahoma: Okla. Stat. Ann. tit. 59 § 1334 (1971).
Oregon: Ore. Rev. Stat. § 140.720 (1969).
South Carolina: S.C. Code Ann. § 17-300 (Supp. 1970).
Tennessee: Tenn. Code Ann. § 6-2123 (Supp. 1970).
Texas: Tex. Code Crim. Proc. art. 17.03 (1966).
Vermont: Vt. Stat. Ann. tit. 13, § 7553a (Supp. 1970).
Virginia: Va. Code Ann. § 19.1-110 (Supp. 1970).

Washington: Wash. Rev. Code Ann. § 3.50.220 (Supp. 1970).
West Virginia: W. Va. Code Ann. § 62-1C-4 (1966).
Wisconsin: Wis. Stat. Ann. §§ 969.02, .03 (1971).
Wyoming: Wyo. R. Crim. P. 8 (c) (Supp. 1969).

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5140

MICHAEL J. CASSIUS,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

REPLY BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5140

MICHAEL J. CASSIUS,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

REPLY BRIEF FOR THE PETITIONER

SUMMARY OF ARGUMENTS

I.

DOUBLE JEOPARDY

Ariz.Rev.Stat.Ann. § 13-1580 violates both the double jeopardy protection against prosecution following conviction and that against multiple punishment. The reference to "conviction" in § 13-1580 may either

be interpreted as establishing conviction as a requisite form of proof of the element of commission or as establishing the judicial act of conviction as an element of the crime. Since no Arizona court has defined what the elements of § 13-1580 are supposed to be, and one has clearly rejected the notion that conviction is a separate element, it is fair to argue as a subsidiary matter that conviction could not be an element where the petitioner was charged with § 13-1580 before he was convicted of burglary and was not charged with having been convicted of burglary.

The fact that the element of committing a felony could in other prosecutions involve the committing of felonies other than burglary does not distinguish it from committing a burglary in this case since the only provable element in this case was committing a burglary. If proof of commission while on release is an element of time of commission, it is an included element within the offense of burglary.

If, on the other hand, the State is arguing that § 13-1580 is composed of the independent judicial act of conviction and the status of release, these are not elements in the sense of elements of *actus reus, mens rea* or consequences of an *actus reus,* as the term elements has been used in applying the *Blockburger* test.

The fact that § 13-1580 purports to create a new crime and punishes anew for the old crime results in a contravention of the double jeopardy clause, while recidivist punishment enhancement statutes which differ in those respects do not violate double jeopardy.

The legislative history of § 13-1580 does not justify a conclusion that it was enacted as part of a policy of

release liberalization or in response to an increase in the rate of crimes committed while on release status.

The State has not contested petitioner's argument that if § 13-1580 is a separate offense for double jeopardy purposes, it is a bill of attainder. The State's argument that *Robinson v. California* does not reflect an Eighth Amendment prohibition of status crimes is without merit. In order to avoid petitioner's cruel and unusual punishment argument, the State argues that § 13-1580 punishes petitioner for his act of burglary and thus runs afoul of the double jeopardy argument.

II.

EQUAL PROTECTION

Since § 13-1580 significantly penalizes persons who exercise the fundamental right to release, punishing them more severely than others who commit like crimes, no evidence of actual deterrence of the exercise of the right need be shown.

Section 13-1580 reflects a legislative presumption that persons released on felony charges are guilty of the charges on which they are released, regardless of whether they are convicted thereof. In so doing, the statute contravenes the presumption of innocence. The *Thoresen* and *De Pugh* cases, cited by the State, should not be considered persuasive authority in this case. The presumption of innocence is protected by the Due Process Clause of the Fourteenth Amendment, is not identical to the requirement of proof beyond a reasonable doubt, and is a substantive as well as an

evidentiary right. It limits the power of legislatures and not just the judicial and executive branches of government. It's infringement can only be justified when demonstrably necessary to promote a compelling state interest. Petitioner does not agree with dicta of the Arizona Court of Appeals suggesting that if § 13-1580 were in the form of an enhanced punishment statute it might pass equal protection muster.

Section 13-1580 does not promote a liberal policy of release and such was not one of its purposes. It does not discourage flight by or ensure the presence of defendants, and it cannot be shown to be demonstrably necessary to discourage repetitious criminal activity.

ARGUMENTS

I.

DOUBLE JEOPARDY

The State begins its discussion of the double jeopardy question in this case by contending that:

> "Petitioner does not here and has never before complained that he has been put to trial twice for the same offense. He has complained only that he has been punished twice."

Brief for Respondent at 8 n. 1. That contention is sheer misstatement. Petitioner has never limited its argument that Section 13-1580 contravened the Fifth Amendment Double Jeopardy Clause to simply an argument that there was multiple punishment for the same offense. Clearly there is that. Just as clearly, there is in

this case an abridgment of the protection for former conviction which arose out of the common law plea of *autrefois convict*. *Ex parte Nielsen*, 131 U.S. 176 (1889) (cited in Brief for Petitioner at 8 & 11).

"From the context of this case, it is apparent that the defendant's conviction for burglary and for § 13-1580, were jeopardy *and* punishment for the same offense." Brief for Petitioner at 10 (emphasis added). In the proceedings on January 4, 1973 (App. 12-19) the trial court first accepted Mr. Cassius' plea of guilty to the burglary count; thereafter, the court tried the charge of "committing a felony while on recognizance on felony charge" (*Ariz.Rev.Stat.Ann.* § 13-1580) and found the defendant guilty. *See* Brief for Respondent at 7. There was no need for a lengthy trial or for a lengthy period of time between the acceptance of the plea to burglary and the trial of the § 13-1580 charge. The nature of § 13-1580 is such that, generally, all the evidence required to prove the charge are matters of judicial record and, therefore, proper subjects for judicial notice. As the State notes, trial of a § 13-1580 charge "will ordinarily be a short, perfunctory process." Brief for Respondent at 15. In this case there was only need for stipulation because the justice of the peace before whom petitioner initially appeared failed to insert a release order in the record when he ordered petitioner released.

Petitioner was first convicted of burglary (on a guilty plea) and then was convicted of "committing a felony while on recogizance on felony charge" (by trial, or as much of a trial as there can be, given the nature of the charge). In fact, since § 13-1580 requires evidence of a felony conviction to prove the § 13-1580 crime, a

§ 13-1580 conviction will always involve a prosecution on that charge subsequent to a conviction for the underlying felony. The duration of time between convictions is not relevant to whether a double jeopardy bar for multiple prosecutions may be interposed. In *Ex parte Nielsen*, the defendant was charged with unlawful cohabitation and adultery. He pleaded guilty at his arraignment to unlawful cohabitation. The same day, after having pleaded guilty to cohabitation and prior to sentencing, the defendant entered his plea of former conviction to the adultery charge. 131 U.S. 176, 177 (1889). If the two charges were for the same offense, then petitioner was placed in jeopardy for section 13-1580 after he had been found guilty (on his guilty plea) for the same offense.

This Court has noted that, like the protection against multiple punishments, the former conviction protection guards against "the punishment that would legally follow the second conviction." *Ex parte Lange*, 85 U.S. 163, 173 (1874). But it should also be noted that the former conviction bar denies the prosecutor control over the punishment imposed (i.e. denies him the opportunity to reprosecute until he obtains the sentence he desires) and denies him the opportunity to harass and inflict unnecessary suffering upon defendants through the ordeal of multiple prosecutions. Note, Twice in Jeopardy, 75 *Yale L.J.* 262, 278 (1965).

Ariz.Rev.Stat.Ann. § 13-1580 provides in part that "[a] person who is *convicted* of committing any felony offense . . . is guilty of the offense of *committing* a felony while released. . . ." (emphasis added). The reference to a felony conviction may indicate that proof of a conviction is necessary to establish the

element of commission of a felony, in which case commission of the felony is the element and proof of conviction is the requisite form of the evidence, not an element. Or, as the State argues, the statute may be interpreted to establish the judicial act of conviction, and not commission of a felony, as an element of the offense.

Petitioner has argued that commission of a felony and *not* the judicial act of conviction of a felony is an element of § 13-1580. Brief for Petitioner at 11. In support of this argument, we have noted that conviction could not possibly be an element of the offense since one cannot be charged with a crime before it is committed, and in this case Mr. Cassius was charged with violating § 13-1580 before he was convicted of burglary. The State now argues that this "issue" was never raised in the state courts of Arizona. Brief for Respondent at 13-14.

The *issue* under discussion is whether § 13-1580 contravenes the Double Jeopardy Clause of the Fifth Amendment as applied to the States by the Due Process Clause of the Fourteenth Amendment. The State does not contest the fact that that issue was properly raised by petitioner in and ruled upon by the state courts of Arizona. In this Court, "[t]he statement of a question presented will be deemed to include every subsidiary question fairly comprised therein." Rule 41(d)(1) of the Rules of the United States Supreme Court. In determining any double jeopardy claim, a court must determine whether there has been jeopardy or punishment imposed more than once for the *same offense*. And when two criminal provisions are involved, a court must determine whether they define or are

being applied to the same offense. An obvious subsidiary line of inquiry when examining the identity of offenses, one incorporated into the "same elements" test, is whether the elements of the offenses are the same. Despite the manifest relevance of this line of inquiry, one will search the opinions of the Arizona Supreme Court and the Arizona Court of Appeals in this case in vain for any statement of what the elements of a § 13-1580 offense are. That determination was never expressly made. The nearest one comes to such a determination is the Arizona Court of Appeals' holding that conviction of a felony was *not* an element of § 13-1580 since conviction is merely a "*judicial act.*" (App. 35) 21 Ariz.App. 78, 82, 515 P.2d 903, 907 (1973).

Petitioner has argued that conviction of a felony is not a separate, distinquishing element of § 13-1580 because petitioner is arguing that § 13-1580 punishes and prosecutes for the same offense as the felony to which it refers. It is a fair subsidiary position to note that the Arizona Supreme Court, which claimed to "have examined the record for fundamental error and [found] none," (App. 50) 110 Ariz. 485, 488, 520 P.2d 1109, 1112 (1974), must also have found that *conviction* of a felony was not an element of § 13-1580; if it were an element, since Mr. Cassius was charged before he was convicted of the felony and since both the complaint and indictment charging him with violating § 13-1580 (App. 4 & 11) accused him of having "committed the crime of burglary," not of having been convicted thereof, the court would have had to reverse Mr. Cassius' conviction as unsupported by the evidence and insufficiently charged.

The State argues that § 13-1580 is an offense composed of two elements which are completely different from the elements of the underlying felony. Brief for Respondent at 12-26. The State claims that the first of these elements is "conviction of a felony (not necessarily a burglary)." Brief for Respondent at 12. As petitioner had noted before, the element of commission of a felony is really a series of disjunctive elements– "committing robbery; or burglary, or grand theft, or arson, or any other felony offense." Brief for Petitioner at 11. In any given prosecution, the only one of these disjunctive elements which can be or need be proven is the element of commission of the one particular offense of which the defendant was convicted. Since Mr. Cassius was only convicted of burglary, the only commission element of which the State could offer proof in its § 13-1580 prosecution was the element of commission of burglary. Thus, the elements of committing burglary and the elements of committing the only provable felony in this case are the same.

The State claims that the second element is "proof that that felony was committed while the defendant was released on bail or on his recognizance." Brief for Respondent at 12. If this is an element of time of commission, it is merely a particularization and thus an included element. The crime of burglary includes both burglaries committed while the defendant is released and burglaries committed while the defendant is not released. A defendant cannot be placed in jeopardy or punished for a particularized, included offense after he has been acquited, convicted or punished for the more general offense. E.g. *Ex parte Nielsen*, 131 U.S. 176

(1889); *Gray v. United States*, 14 F.2d 366 (8th Cir. 1926); *Colson v. Johnston*, 35 F.Supp. 317 (N.D. Cal. 1940); *People v. Greer*, 30 Cal.2d 589, 184 P.2d 512 (1947); *People v. Armstrong*, 100 Cal.App.2d 852, 224 P.2d 490 (1950); *People v. Bugarin*, 507 P.2d 875 (Colo. 1973); *State v. Midgeley*, 15 N.J. 574, 105 A.2d 844 (1954).

On the other hand, if the State's reference to a conviction element is to the judicial act of conviction, independent of the commission of a felony, and its reference to a release element is to the status of being released, then neither of these "elements" involves what Anglo-American jurisprudence has considered elements of criminal responsibility, an *actus reus*, *mens rea*, or consequence of an *actus reus*. Although the State casually refers to the test of *Blockburger v. United States*, 284 U.S. 299 (1932) in a literal sense as requiring proof of an "additional fact." The additional fact to which *Blockburger* refers has always been interpreted as an element of *actus reus*, *mens rea* or a consequence of an *actus reus*. Each of the cases cited by the State as illustrating the *Blockburger* test involves such an element. But neither a judicial act nor a status such as the State appears to propose would be such an element.

Although the State admits that "it is evident the Legislature intended burglary and 1580 to be separate offenses and each to be severally punished" (Brief for Respondent at 27), it attempts to analogize § 13-1580 to recidivist enhanced punishment statutes. Brief for Respondent at 14-16. As the State admits § 13-1580 differs from enhanced punishment statutes in that it "does create a new offense and it does punish anew

[for the old crime]." Brief for Respondent at 15. It is precisely in these distinctions that § 13-1580 runs afoul of the double jeopardy clause whereas enhanced punishment statutes do not. This Court has found recidivist enhanced punishment statutes not to violate the prohibition against double jeopardy because they do not charge "an offense with respect of the former offense" *Moore v. Missouri*, 159 U.S. 673, 677 (1895), are "not a distinct charge of crimes" *McDonald v. Massachusetts*, 180 U.S. 311, 313 (1901), and because they do not impose " 'a punishment for the same offense for a second time' " *Moore v. Missouri*, 159 U.S. 673, 676 (1895), but rather, impose punishment "for the new crime only," *McDonald v. Massachusetts*, 180 U.S. 311, 312 (1901). Compare the decisions concerning such statutes with *Reynolds v. Cochran*, 365 U.S. 525, 529-30 (1961), *on remand*, 138 So.2d 500 (Fla. 1962).

Because § 13-1580 purports to create a separate crime and punishes anew for the old crime, conviction of it carries a variety of consequences that do not flow from an allegation under an enhanced punishment statute. As pointed out in Brief for Petitioner at 8-9, conviction of § 13-1580 acts as a conviction for a separate, subsequent offense to activate recidivist penalty provisions, effect less advantageous accruals of "good behavior time" credits and prolong eligibility dates for parole. Because it can be charged at any time after conviction, including after the expiration of sentence on the underlying felony, it gives the prosecutor far more control over sentencing than he possesses under an enhanced punishment statute. Because it requires trial anew, § 13-1580 gives the

prosecutor greater opportunity to harass through successive prosecutions than does an enhanced punishment statute.

The State elaborately claims a legislative purpose and history for § 13-1580 allied to liberalization of release procedures and a "proliferating problem of those on bail continuing their criminal careers." Brief for Respondent at 27-30 & 44-45. But such a claim is sheer speculation since there simply is no published legislative history or statement of legislative purpose for § 13-1580 which illuminates the intent of the legislature in enacting § 13-1580 and there is no evidence that its enactment was preceded by a dramatic increase in the rate of crime committed while on release status. As the State notes, § 13-1580 was enacted some two years after provision was made for revocation and denial of release following an allegation that crime was committed while on release status. Brief for Respondent at 29. Ch.126, § 1, [1972] *Ariz.Laws*2d Sess. 663. And § 13-1580 was enacted more than a year before Arizona's first provision for a legal presumption in favor of release before trial became effective, that provision being Rule 7.2(a) of the Arizona Rules of Criminal Procedure, promulgated by the Arizona Supreme Court, not the Legislature.

Petitioner has argued that if § 13-1580 is a separate offense within the meaning of the double jeopardy clause then surely, since § 13-1580 imposes a legislative punishment applied to an easily ascertainable group without the necessity of an additional trial, it is a bill of attainder. And, further, since § 13-1580, is under the State's construction, a status crime, it imposes a cruel and unusual punishment. Brief for Petitioner at 12-13.

The State candidly admits that prosecution under § 13-1580 "will ordinarily be a short, perfunctory process." Brief for Respondent at 15. And the State argues, "At the 1580 trial the proof is *not of the acts*, but the conviction that resulted from those acts plus petitioner's bail status." Brief for Respondent at 17 (emphasis added).

The State does not contest the argument that § 13-1580 contravenes the constitutional prohibition against bills of attainder. *Compare, United States v. Brown*, 381 U.S. 437 (1965); *Cummings v. Missouri*, 71 U.S. 277, 316-25 (1867).

The State does, however, argue that there is no abridgment of the Eighth Amendment's Cruel and Unusual Punishment Clause. Brief for Respondent at 30-32. The State's principal argument is that *Robinson v. California*, 370 U.S. 660 (1962) should be limited to its facts, and does not reflect a prohibition against status crimes.

This Court, of course, is the best and final judge of its own holdings and intendments. And so there is a certain futility in engaging in any prolonged argument of this kind. It should, however, be noted that this Court's opinion in *Robinson* declared as follows:

> "[T]he jury were instructed that. . . .[t]he appellant could be convicted. . .if they found simply that the appellant's '*status*' or 'chronic condition' was that of being 'addicted to the use of narcotics.'" 370 U.S. at 665 (emphasis added).
>
> "The statute, therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their adminis-

> tration. . . .Rather, we deal with a statute which makes the '*status*' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.' "
> 370 U.S. at 666 (emphasis added).

Indeed, the very dissent of Mr. Justice Clark, from which the State quotes, notes:

> "The majority strikes down the conviction primarily on grounds that petitioner was denied due process by the imposition of criminal penalties for nothing more than being in a status."
> 370 U.S. at 682.

It may well be, as is alluded to by some of the opinions cited by the State, that the cruel and unusual punishment protection interpreted by *Robinson* is broader than just a prohibition against status crimes, but it is at least that much, and none of the authorities cited by the State (Brief for Respondent at 31) dispute this. In sum, *Robinson*, reflects a requirement that crimes must contain an *actus reus*.

Finally and ironically, although the State and the Arizona Supreme Court in opposing petitioner's double jeopardy argument, have contended that § 13-1580 has no element in common with the underlying felony and is not a second punishment for his burglary conviction, the State finds it necessary to reverse that contention when faced with petitioner's cruel and unusual punishment argument. The State declares that when Mr. Cassius committed the burglary of which he was convicted:

> "his status was that of a charged felon on his own recognizance but neither *Robinson* nor any other authority cited by him would prevent a state from punishing him for that second burglary." Brief for Respondent at 32.

II.

EQUAL PROTECTION

The State concedes that the right to bail or other forms of release is fundamental and notes that there is federal as well as state constitutional protection for it. Brief for Respondent at 35-36 & 36 n.1. *See e.g., Schilb v. Kuebel*, 404 U.S. 357, 365 (1971). The State argues, however, that petitioner has not 'demonstrated a penalizing or impairment or chilling of that right'. Brief for Respondent at 35-38. It is unclear what kind of a showing the State believes petitioner must make. As the State admits, "[t]he obligation not to violate the law" applies "to those persons not released before trial" as well as those released. Brief for Respondent at 43. But the person who is in custody or the person who is free and not on a release status (and this may include persons accused of crimes who have not been arrested therefor; *see Ariz.R.Crim.* P.4.1& 7.4(a), and App. 13-14) is punished only once, while the person who exercises his right to release is, for that reason, punished twice and punished more severely for committing the same felonious act. The imposition of additional punishment because a fundamental right has been exercised is certainly a penalizing of that right. *See, United States v. Jackson*, 390 U.S. 570 (1968). Evidence of actual deterrence of the exercise of a right is not necessary if the challenged discrimination significantly penalizes such exercise. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 257-58 (1974). Here exercise of the right to release is penalized by the collateral consequences of an additional felony conviction and by up to five years additional imprisonment.

If the duty to obey the law is not peculiar to released persons, why is it that § 13-1580 punishes such persons more severely, and thereby imports that they are more culpable, than others who violate the law? The answer is that § 13-1580 presumes that a person released upon a felony charge is guilty of that charge and when he commits a felony while released, the latter is in fact the second felony he has committed. This presumption pervades the State's brief. *See, e.g.*, Brief for Respondent at 31-32, 64 & 66.

To prove a violation of § 13-1580, three events must occur. (1) The defendant must be charged with felony A and released (on bail or recognizance) thereon. (2) The defendant must subsequently be charged with felony B, which is alleged to have occurred while the defendant was released under charge A. (3) The defendant must be convicted of felony B. The defendant does not have to be convicted of felony A. Indeed, the defendant may be shown to be utterly blameless, completely innocent of charge A, yet it does not matter; § 13-1580 still treats the defendant as a recidivist. It is the presumption of innocence with regard to charge A which is thus contravened, and the fact that the defendant must be convicted of charge B (Brief for Respondent at 53) is utterly irrelevant thereto.

The State relies upon *United States v. Thoresen*, 428 F.2d 654, 661 (9th Cir. 1970) and *United States v. De Pugh*, 266 F.Supp. 453, 454-55 (W.D. Mo. 1967) (ruling on a pretrial motion). Each of these cases interpreted former section 15 U.S.C. § 902 (e), which had been repealed by the time Thoresen's case was heard by the Court of Appeals. Omnibus Crime Control

and Safe Streets Act of 1968, Pub. L.No. 90-351, Title IV, § 906, 82 Stat.197, 234. The statute in question made it unlawful for a person under indictment for a felony to transport firearms or ammunition in interstate commerce. These cases involve the transportation of dangerous instrumentalities, a factor, not present in petitioner's case. But, in any event, the best that can be said for these decisions is that they are bad law. Outside of restating the defendant's argument, *DePugh* doesn't even mention the presumption of innocence. In fact, the decision appears to presume to the contrary:

> "A person who is under indictment for alleged commission of a crime punishable by imprisonment for a term exceeding one year. . .presents more than ordinary risk (even though he might later not be convicted of the offense charged) in transporting or possessing firearms." 266 F.Supp. at 454.

Both *DePugh* and *Thoresen* apply a "reasonable relationship" test of equal protection instead of the demonstrably necessary-compelling state interest test which inheres when a basis of classification affects a constitutionally protected fundamental right. Both also seem to imply that the presumption of innocence is a right which only applies to matters of proof at trial (i.e., that is solely an evidentiary right and not a substantive right).

It cannot now be questioned that the presumption of innocence is protected by the Due Process Clause of the Fourteenth Amendment. In addition to *In re Winship*, 397 U.S. 358 (1970), cited in Brief for Petitioner at 16, *see Cupp v. Naughten*, 414 U.S. 141 (1973); *Deutch v. United States*, 367 U.S. 456, 471 (1961); *Stack v.*

Boyle, 342 U.S. 1, 4 (1951); *Gaito v. Brierly*, 485 F.2d 86, 88-89 (3rd Cir. 1973); *Bentley v. Crist*, 469 F.2d 854 (9th Cir. 1972); *Hernandez v. Beto*, 443 F.2d 634 (5th Cir.), *cert denied*, 404 U.S. 897 (1971). This Court has held that the presumption of innocence is broader than and not identical to the requirement of proof beyond a reasonable doubt. *Coffin v. United States*, 156 U.S. 432, 457-61 (1895). Even as an evidentiary matter, the presumption cautions against " 'all the suspicion that arises from the arrest, the indictment, and the arraignment' " of defendants. *United States v. Thaxton*, 483 F.2d 1071, 1073 (5th Cir. 1973). But the presumption of innocence is also a substantive right. And just as the executive department of government may not impose punishment in contravention of the presumption of innocence, *Conklin v. Hancock*, 334 F.Supp. 1119, 1121 (D.N.H. 1971); *Hamilton v. Love*, 328 F.Supp. 1182 (E.D.Ark.1971); *cf. Screws v. United States*, 325 U.S. 91 (1945), so the legislative department should not. *cf. Cummings v. Missouri*, 71 U.S. 277, 325, 328, 330-31 (1867).

The error of *DePugh* and *Thoresen* is further illustrated by their effect. If a defendant transported firearms while under indictment, something other presumptively innocent people could do, his conviction therefor would stand even though the indictment was subsequently quashed. *DePugh v. United States*, 393 F.2d 367 (8th Cir.), *cert. denied*, 393 U.S. 832 (1968). But if the defendant transported firearms following a felony conviction, also a violation of former 15 U.S.C. § 902 (e), and his felony conviction was made voidable by violations of his procedural constitutional rights, then his § 902 conviction would have to

be overturned. *Dameron v. United States*, 488 F.2d 724 (5th Cir. 1974); *Pasterchik v. United States*, 466 F.2d 1367 (9th Cir. 1972); *United States v. Thoresen*, 428 F.2d 654, 662-64 (9th Cir. 1970).

The State argues that petitioner's equal protection argument is without merit because the Arizona Court of Appeals suggested that a punishment enhancement statute might be acceptable to it. Brief for Respondent at 66-67. (App. 41) 21 Ariz.App.78, 85-86, 515 P.2d 903, 910-11 (1973). Petitioner agrees with the State that, *with regard to infringements of the equal protection clause* distinctions between § 13-1580 and punishment enhancement statutes based upon the same criteria as § 13-1580 are immaterial. Petitioner has not accepted such a distinction before this Court. And petitioner expressly rejected that distinction below.

> "Defendant submits in addition that appellee's reliance on D.C. Code Ann. § 23-1328 (1971) is also misplaced. Though the [Arizona] Court [of Appeals] suggests the D.C. provision as a possible alternative, it stops short of attesting to its constitutionality. Indeed, under the Court's decision it is difficult to see how any statute which punishes a person solely for having committed a felony while on bond can avoid the defects of A.R.S. § 13-1580 (Cum.Supp. 1972)." Defendant's Opposition to Motion for Rehearing at 6, *State v. Cassius*, 21 Ariz.App. 78, 515 P.2d 903 (1973) (footnote omitted).

The State argues that § 13-1580 somehow promotes a liberal policy of release and that such was one of its purposes. Brief for Respondent at 44-45 at 64. As previously noted, *supra* at p.*10-11*, § 13-1580 was not enacted concurrent with any legislative scheme of

release liberalization and the only liberalization of release procedures in Arizona occurred more than a year after § 13-1580's enactment as a result of a promulgation by the Arizona Supreme Court. Section 13-1580 singles out for more severe punishment those who commit felonies while on bail or recognizance; it has no effect upon whether and under what conditions release will initially be granted. The State apparently believes that those whose rights are infringed by § 13-1580 should welcome it because, for reasons unknown, the Legislature did not also enact a preventive detention measure (Brief for Respondent at 44-45); petitioner cannot agree.

The State argues that another purpose of § 13-1580 is to ensure the presence of defendants at trial and discourage flight. Brief for Respondent at 46-50 &64. But § 13-1580 does not make flight a crime; indeed, one must have remained in Arizona to violate § 13-1580. The State claims that "the risk of flight increases 'proportionately' with the commission of subsequent offenses while released on bail, because of the possibility of cumulative penalties." Brief for Respondent at 49. The little empirical evidence which is available refutes that assertion. *See, e.g., Hearings on Amendments to the Bail Reform Act of 1966 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess., at 604 (1969) (Excerpts from the Report of the President's Comm'n on Crime in the District of Columbia). But, in any event, if one accepts that claim, then § 13-1580 should encourage flight since it raises the possibility of an additional cumulative penalty.

Finally, the State argues that § 13-1580 bars release following repetitious criminal activity, prevents such repetitious criminal activity among released persons and thereby prevents undermining of the administration of justice. Brief for Respondent at 52 & 64-65. There is not one word in § 13-1580 regarding conditions of release following imposition of the charge therein. Provisions for release revocation were enacted and the principal Arizona decision thereon occurred prior to § 13-1580's enactment, as is noted in Brief for Respondent at 28-29. And the State gives no clue why § 13-1580 should be any more efficacious in reducing repetitious crimes than those measures otherwise currently available. *See* Brief for Petitioner at 17.

CONCLUSION

Petitioner continues to rely on all matters raised in his opening Brief for the Petitioner. For the reasons expressed therein and for the foregoing reasons, the judgment of the Arizona Supreme Court should be reversed and the case remanded with instructions that the judgment of conviction for *Ariz.Rev.Stat.Ann* § 13-1580 and sentence imposed thereon be ordered vacated and the charge of violation of

Ariz.Rev.Stat.Ann § 13-1580 contained in Count II of the indictment against petitioner be dismissed.

Respectfully submitted,

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